

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1937.

No. 6964

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, JOHN WILCOX
WHITESIDE AND MARGARET CAREY WINN
APPELLANTS,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY
EXECUTOR OF THE ESTATE OF MAY B
BEHRENS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED MAY 4, 1937

PRINTED JUNE 22, 1937

United States Court of Appeals for the District of Columbia

APRIL TERM, 1937.

No. 6964

MARY ELIZABETH WHITESIDE, JOHN WILCOX
WHITESIDE AND MARGARET CAREY WINN,
APPELLANTS,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY,
EXECUTOR OF THE ESTATE OF MAY B.
BEHRENS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

INDEX.

	Original Print	
Last Will and Codicil of William H. Butler, deceased.....	1	1
Last Will and Testament of May B. Behrens, deceased.....	5	4
Agreement between Mary I. Butler and The Washington Loan and Trust Company, dated August 19, 1921.....	7	6
Petition of Executor for Instructions	9	8
Answer of Mrs. Grace M. Herndon et al. to petition for instruc- tions	15	13
Answer of Rachel M. Bristol	18	15
“ “ Baptist Home of Philadelphia	19	16
“ “ The Methodist Home of the District of Columbia..	22	18
“ “ Calvary Methodist Episcopal Church	23	20
“ “ Mary Elizabeth Whiteside et al.	24	21

	Original Print	
Memorandum concerning subpoena issued August 27, 1936....	29	25
“ “ “ to answer returned	29	25
“ “ affidavit of William H. Baden.....	29	25
“ “ order of publication	29	26
“ “ proofs of publication	29	26
“ “ affidavit of William H. Baden.....	29	26
“ “ Decree Pro Confesso	29	26
Decree directing Executor to pay interest on legacies.....	30	26
Memorandum concerning receipt of Register of Wills.....	31	27
“ “ Motion to extend time for filing Bill of Exceptions	31	27
“ “ Order extending time for filing Bill of Exceptions	31	28
“ “ Bill of Exceptions and Notice of Submission	31	28
Assignments of errors	32	28
Additional assignments of errors	34	29
Designation of record	35	30
Certificate of the Register of Wills	38	32
Bill of Exceptions	40	33

United States Court of Appeals for the District of Columbia

1 Filed, Apr 21 1902 Louis A. Dent Register of
 Wills, D. C. Clerk of Probate Court.

I, William H. Butler, of the City of Washington, District of Columbia, being of sound and disposing mind, memory and understanding, do make, publish and declare this instrument in writing as and for my last will and testament, hereby expressly revoking all other and former wills by me at any time heretofore made and published.

First. I direct my hereinafter named Executor to pay and discharge all my just debts, including funeral expenses, as soon after my decease as practicable.

Second. I give and bequeath unto my daughter, Jenna May Butler, my Secretary book-case, with all the books therein contained.

Third. I give, devise and bequeath unto my wife, Mary I. Butler, absolutely and in fee simple, part of lot numbered twenty-five (25) in square numbered four hundred and thirty-three (433) improved by house number 200 8th Street, S. W., Washington, D. C. and now occupied by us as a homestead, together with all the personal effects and household furniture therein contained, except the Secretary book-case and books herein before bequeathed to my daughter.

Fourth. If my half brother, Thomas R. Mitchell, shall be indebted to me in any amount of money at the time of my death, it is my will that such indebtedness shall be forgiven and discharged; and I hereby direct my hereinafter named Executor to cancel and deliver to him any evidence or evidences of indebtedness which may be found among my papers.

Fifth. I give, devise and bequeath unto The Washington Loan and Trust Company, a corporation having an office and doing business in the City of Washington, D. C., absolutely and in fee simple, property known as No. 612 Louisiana Avenue, N. W., Washington, D. C., being part of Lot

2 numbered two (2) in Square numbered four hundred
2 and fifty-nine (459), the same to be held by it in and
 upon the following trusts, that is to say: In trust to
permit the said Thomas R. Mitchell to use and occupy said
premises, or to receive the income therefrom for and dur-
ing the term of his natural life, and on his death, I hereby
direct my said Trustee to sell said real estate to the best ad-
vantage, and the proceeds thereof to pay over to my said
daughter, Jenna May Butler, or her heirs and assigns. I
hereby give my said Trustee full power and authority to
sell said real estate at any time prior to the decease of the
said Thomas R. Mitchell for the purpose of changing the
investment, the income from such substituted investment to
be paid to him the said Thomas R. Mitchell, in the same
manner and for the same period as herein before set forth
as to the income of said real estate.

Sixth. All the rest, residue and remainder of my prop-
erty, real, personal and mixed, wheresoever and howsoever
situated, now owned or that may hereafter be acquired by
me, I give (devise and bequeath unto The Washington
Loan and Trust Company, a corporation existing under the
laws of the United States and having an office and doing
business in the District of Columbia, absolutely and in fee
simple, the same to be held by it in and upon the following
trusts, that is to say: In trust to take charge of, manage,
control, invest, sell or mortgage the same or any part there-
of, and the proceeds thereof to invest and re-invest for the
best interests of my estate, and the income therefrom, after
the payment of taxes, insurance, repairs and other neces-
sary expenses incidental to the management of said estate,
to divide into two (2) equal parts and to pay one part
thereof, in monthly or quarterly installments, in its discre-
tion, to my wife, Mary I. Butler, for and during the term of
her natural life, and to pay the other part thereof to
3 my daughter, Jenna May Butler, in the same man-
 ner, until she attains the age of fifty (50) years; but
in the event of my said wife predeceasing my said daughter,
my said Trustee shall pay the whole of the income from my
said estate to my said daughter, Jenna May Butler, until
she attains the age of fifty (50) years, at which time I
hereby direct my said Trustee to pay over, transfer and
deliver unto my said daughter, Jenna May Butler, or her

heirs and assigns, the entire corpus of my estate then in its hands.

Seventh. The foregoing bequests and devises in favor of my said wife, Mary I. Butler, are intended and are hereby declared to be in lieu of all dower or other interest in my estate.

Lastly. I hereby nominate, constitute and appoint The Washington Loan and Trust Company of Washington, D. C., the Executor of this my last will and testament.

WITNESS my hand and seal this 14 day of December, A. D. 1900.

(Seal)

WILLIAM H. BUTLER

Then and there signed, sealed, published and declared by the said Testator, William H. Butler, as and for his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto set our names as subscribing witnesses.

April 24 1902

Apr 24 1902

Apr 23/02

JOHN B LARNER

WILSON G REED

W. RUSSELL GRAHAM

4 Filed, Apr. 21 1902 Louis A Dent Register of Wills, D. C. Clerk of Probate Court.

I, William H. Butler, of the City of Washington, District of Columbia, do make this instrument in writing, my codicil, hereby confirming my last will and testament made on the 14th day of December, A. D. 1900, excepting so far as the disposal of my property is changed by this codicil.

First. In the event of my death, I direct The Washington Loan and Trust Company, the Executor named in my said last will and testament, to pay out of my estate the sum of one thousand (1000) dollars, or so much thereof as may be necessary, for a tomb stone or monument to be erected over my grave under the direction of my half brother, Thomas R. Mitchell.

Second. I give and bequeath to Odell S. Smith my gold watch and chain.

Witness my hand and seal this 29th day of January, A. D. 1901.

W. H. BUTLER (Seal)

Then and there signed, sealed, published and declared by the said Testator, William H. Butler, as and for a codicil to his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto set our names as subscribing witnesses.

ROBERT F. MILLER
900 F Street

LLOYD J. DILL
900 F Street

BRICE J. MOSES
2147 N St. N. W.

April 23 1902

(Endorsement: Last Will & Codicil of William H. Butler, deceased. Filed April 21, 1902. Louis A. Dent, Register of Wills, D. C. Clerk of Probate Court. Admitted to Probate April 24, 1902).

5 Filed Jan 28 1920 James Tanner, Register of Wills, D. C. Clerk of Probate Court.

I, May B. Behrens, widow of Frederick Behrens, of the City of Washington, District of Columbia, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument in writing as and for my last will and testament, hereby expressly revoking any and all former wills by me at any time made and published.

First. I direct my hereinafter named executor to pay off and discharge any and all just debts that may be due and owing by me at the time of my decease, as soon thereafter as may be practicable.

Second. I give and bequeath unto Grace Middleton Herdon, Isabel Middleton Morley, George Middleton, and Frederick Middleton, all of the City of Washington, District of Columbia, each the sum of Five Thousand (\$5,000) Dollars.

Third. I give and bequeath unto Rachel Mothersead of the City of Washington, District of Columbia, all of my jewelry and personal effects, and the sum of Twenty Thousand (\$20,000) Dollars, and unto Mrs. W. H. Bowker, now residing at the Baptist Home, in the City of Philadelphia,

State of Pennsylvania, the sum of Ten Thousand (\$10,000) Dollars, provided she survives me.

Fourth. I give and bequeath unto the Methodist Home For Aged People of Washington, District of Columbia, and unto the Calvary Methodist Episcopal Church of Washington, District of Columbia, each the sum of Twenty Thousand (\$20,000) Dollars.

Fifth. I give and bequeath unto Lawrence M. Starbuck, Jr., and Elizabeth Starbuck, now residing with their parents Lawrence M. Starbuck, familiarly known as L. Macey Starbuck, and his wife, Marie Elizabeth Starbuck, of Brooklyn, New York, each the sum of \$5,000.

Should either of the said legatees predecease me, or

HSW CJD WHB

MAY B. BEHRENS

6 die before coming into possession through administration of the legacy hereinbefore bequeathed to him or her in this the Fifth paragraph hereof, I give and bequeath to the survivor of them the legacy herein bequeathed to the deceased one.

Sixth. All the rest, residue and remainder of my estate of every kind and description, real and personal, wheresoever and howsoever situated, now owned or that may hereafter be acquired by me, I give, devise and bequeath unto Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Cary Whiteside, children of James L. and Delma W. Whiteside, absolutely and in fee simple, share and share alike.

Lastly. I hereby nominate, constitute and appoint The Washington Loan and Trust Company, a corporation of Washington, District of Columbia, as the executor of this my last will and testament.

Witness my hand and seal this 7th day of March, A. D., 1919.

MAY B. BEHRENS (Seal)

Then and there signed, sealed, published and declared by the said testatrix, May B. Behrens, as and for her last will and testament in the presence of us, who, at her request in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses, she hav-

ing first signed and we initialed the foregoing page hereof for identification.

Feb 5-1920 HENRY S. WOOD
900 F St., N. W.

Feb 7-1920 CHAS. J. DIENELT

Feb 7-1920 W. H. BADEN.

(Endorsement: Last Will and Testament of May B. Behrens, deceased. Filed January 28, 1930. James Tanner, Register of Wills, D. C. Clerk of Probate Court. Admitted to Probate and Record February 11, 1920).

7 Filed Mar 17 1937 Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court

(Copy of Agreement)

Whereas, under the will of William H. Butler, deceased, dated December 14, 1900, and duly admitted to probate in the Supreme Court of the District of Columbia, all the rest, residue and remainder of his property was devised and bequeathed unto The Washington Loan and Trust Company with power of sale and of investment and reinvestment, etc., and upon the trust to divide the income into two equal parts and pay one part thereof to Mary I. Butler, wife of the said William H. Butler, and one part thereof to Jenna May Butler, his daughter, and after the decease of the said Mary I. Butler and Jenna May Butler to pay the whole of the corpus of said rest, residue and remainder to the estate of said Jenna May Butler. And the said Jenna May Butler afterwards married and became May Butler Behrens.

And Whereas, on the 25th day of January, in the year nineteen hundred and twenty, the said May Butler Behrens departed this life, so that under said trust clause of said will the said Mary I. Butler is now entitled to one-half of the net income from the said rest, residue and remainder of said estate, and the estate of May Butler Behrens is entitled to the remaining one-half of the income from said rest, residue and remainder, and after the death of the said Mary I. Butler the estate of the said May Butler Behrens will be entitled to receive the whole of the principal of said rest, residue and remainder,

And Whereas, the said May Butler Behrens left a last will and testament dated the seventh day of March, A. D.

nineteen hundred and nineteen, in which The Washington Loan and Trust Company is nominated as executor, which said last will and testament has been duly admitted to probate in the Supreme Court of the District of Columbia and Letters Testamentary granted unto The Washington Loan and Trust Company,

And Whereas, it is to the advantage of both the said Mary I. Butler and the estate of the said May Butler Behrens that the principal of said rest, residue and remainder be now divided equally so that one-half thereof can be at once paid over to the estate of the said May Butler Behrens fully released and discharged from said trust and the remaining one-half be held by the said The Washington
8 Loan and Trust Company under said will, paying the net income therefrom to the said Mary I. Butler for life, and after her death the principal thereof to the estate of said May Butler Behrens,

And Whereas, the estate of the said William H. Butler now held by the said The Washington Loan and Trust Company in trust as aforesaid consists of the sum of \$131,749.21 in cash, and the following real estate:

Premises No. 439 Tenth Street, N. W.

“ “ 926-28 Liberty Street, S. W.

“ “ 912-12½, 914-14½ Liberty Street, S. W.

“ “ 914 D Street, S. W.

“ “ 914½ D Street, S. W.

“ “ 940 E Street, S. W.

“ “ 723 8th Street, S. W. (now under contract to be sold for \$1800.00)

“ “ 642 E Street, S. W.

do rear of

“ “ 605 6th Street, S. W.

Undivided one-third interest in premises Nos. 200-202
Fourteenth Street.

Now Therefore, for the purpose of carrying out said plan the said Mary I. Butler does hereby authorize The Washington Loan and Trust Company, as trustee for the estate of William H. Butler, to divide the said cash into two equal parts, and as said real estate is sold to also divide the proceeds thereof into two equal parts, and as soon as practicable hereafter to pay one-half of said cash, and when and

as said real estate is sold one-half of the proceeds thereof over to The Washington Loan and Trust Company as executor of the estate of the said May Butler Behrens to be by it distributed under said will, and to retain for the purpose of reinvestment one-half thereof to be held by the said The Washington Loan and Trust Company, as trustee under the will of the said William H. Butler, deceased, for Mary I. Butler for life, with remainder to the estate of the said May Butler Behrens.

Witness the hand and seal of the said Mary I. Butler this 19th day of August, A. D. 1921.

(Signed) MARY I. BUTLER (Seal)

Witness:

(Signed) ETTA C. WHITTEN

(Endorsement: Copy of Agreement between Mary I. Butler and The Washington Loan and Trust Company, Executor. Filed March 17, 1937. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

9 Filed Aug 27 1936 Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court

In the District Court of the United States
for the District of Columbia

Probate No. 26,624.

In Re: ESTATE OF MAY B. BEHRENS, Deceased.

Petition for Instructions

To the District Court of the United States, for the
District of Columbia:

The petition of The Washington Loan and Trust Company, executor of the will of May B. Behrens, deceased, for instructions as to payment of interest on certain legacies, respectfully shows unto the Court as follows:

1. Petitioner is a corporation existing and doing business in the District of Columbia, under the laws in force therein, and authorized by law to act as trustee, executor and administrator of estates of deceased persons.

2. That May B. Behrens died on or about the 25th day of January, 1920, leaving a last will and testament dated the 7th day of March, A. D. 1919, in which petitioner was named

as executor. Said will was duly admitted to probate and record by this Court on the 11th day of February, 1920, and petitioner thereupon qualified thereunder and has ever since performed its duties in connection with the administration of said estate.

3. The present financial status of the estate is fully set forth in the account annexed hereto and prayed to be read as a part hereof, marked "Petitioner's Exhibit A" and a history of the administration will be found in the various accounts heretofore filed herein and prayed to be
10 read as part hereof. Without repeating the details therein fully set forth, the following provisions of the will and the following facts, briefly stated, are brought to the attention of the Court for consideration in connection with this petition.

4. Bequests: After providing for the payment of debts, the sum of \$5,000.00 was bequeathed unto each of the following persons: Grace Middleton Herndon, Isabel Middleton Morley, George Middleton and Frederick Middleton; the sum of \$20,000.00 unto Rachel Mothershead (now Rachel Mothershead Bristol); the sum of \$10,000.00 unto Annie T. Bowker, described in said will as Mrs. W. K. Bowker; the sum of \$20,000.00 unto the Methodist Home for Aged People of Washington, D. C.; the sum of \$20,000.00 unto the Calvary Methodist Church of Washington, D. C.; the sum of \$5,000.00 unto Lawrence M. Starbuck, Jr., and the sum of \$5,000.00 unto Elizabeth Starbuck, as will appear in Items two, three, four and five of the said will of May B. Behrens. After the payment of the foregoing legacies, the rest, residue and remainder is devised and bequeathed unto Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Carey Whiteside, share and share alike.

5. The said May B. Behrens was the only heir at law and next of kin of William H. Butler, who died on or about the 17th day of April, A. D. 1902, leaving a last will and testament dated the 14th day of December, A. D. 1900, and a codicil thereto dated the 29th day of January, A. D. 1901, in which, inter alia, the residuum of the estate of said William H. Butler was devised and bequeathed unto The Washington Loan and Trust Company, in trust to take charge of, manage, control, invest, sell or mortgage the same, or any

part thereof, and the proceeds thereof to invest and reinvest for the best interest of his estate, and the income therefrom to divide into two equal parts, and to pay one part thereof, in monthly or quarterly installments, in its discretion, to his wife, Mary I. Butler, for and during the term
 11 of her natural life, and to pay the other part thereof to his daughter, Jenna May Butler, in the same manner, until she attained the age of 50 years; and in the event of his wife predeceasing his said daughter, the whole of the income became payable to his said daughter until she attained the age of 50 years, at which time the entire corpus of the trust estate was directed to be paid over, transferred and delivered unto her; that said Jenna May Butler, who became known by marriage as May B. Behrens, predeceased the said Mary I. Butler, and after her death an agreement was entered into by your petitioner, as executor of the estate of May B. Behrens, and the said Mary I. Butler, whereby one-half of the residuum of the estate of William H. Butler was distributed unto petitioner as executor of the estate of May B. Behrens, and thereafter petitioner accounted for same as will appear by its accounts heretofore filed herein.

6. Petitioner has been able to make only partial payment on account of the sums bequeathed by the will of said May B. Behrens as the assets of her estate, prior to the death of Mary I. Butler, were insufficient to pay the same in full. The dates and amounts of such partial payments are set forth in detail in the statement attached hereto and prayed to be read as a part hereof, marked "Exhibit B."

7. Petitioner alleges that the said Mary I. Butler departed this life on or about the 20th day of March, 1936, and it has received from The Washington Loan and Trust Company, trustee of the estate of William H. Butler, the residuum of the estate of William H. Butler and now has sufficient money with which to pay the legacies in full, the principal sum of which remaining unpaid is \$30,448.30.

8. In view of the provisions of the will of the said May B. Behrens, hereinbefore mentioned, and the fact that
 12 the assets of the estate of May B. Behrens were insufficient to pay in full the bequests set forth in paragraph four hereof, until the death of Mary I. Butler, petitioner is in doubt as to whether interest should be paid up-

on the remaining principal sum of the said bequests, and if so, from what date, and at what rate, it being contended by some of the general legatees that interest should be paid on the remaining principal sum of the bequests made to them, while the residuary legatees claim that no interest should be paid thereon.

9. Upon receipt of the Court's instructions, petitioner proposes, subject to the approval of the Court, to make full and final distribution of the assets of the estate of May B. Behrens to the persons who may be found to be entitled to receive the bequests and the residuum of her estate.

10. Petitioner believes that the only beneficiaries whose share will be diminished by the payment of the interest on the bequests made by May B. Behrens in Items two, three, four and five of her will, would be the persons named in paragraph six of said will as the residuary legatees and devisees.

11. That on the 17th day of March, 1922, Annie T. Bowker, also known as Mrs. W. H. Bowker, assigned unto the Baptist Home of Philadelphia, the bequest made to her in the will of said May B. Behrens.

12. That the names and addresses of the persons interested in the subject matter of this petition are as follows:

Mrs. Rachel Bristol,
820 Connecticut Avenue,
Washington, D. C.

Mrs. Grace M. Herndon,
2 College Lane,
Haverford, Penna.

Mrs. Isabel M. Morley,
1 Wetherill Road,
Westmoreland Hills, Md.

Mr. George E. Middleton,
955 Belvidere Avenue,
Plainfield, N. J.

13 Mr. Frederick Middleton,
4419 Iowa Avenue, N. W.,
Washington, D. C.

Mr. Lawrence M. Starbuck,
1224 Horn Avenue,
Los Angeles, Calif.

Mr. John Wilcox Whiteside,
 3040 Franklin Street,
 San Francisco, Calif.
 Margaret Carey Whiteside,
 (now Margaret Carey Winn),
 1121 24th Street, N. W.,
 Washington, D. C.
 Miss Elizabeth Starbuck,
 44 West 9th Street,
 New York City.
 Baptist Home of Philadelphia,
 Assignee of Mrs. W. H. Bowker,
 Philadelphia, Pennsylvania.
 Mary Elizabeth Whiteside,
 1921 Pennsylvania Ave., N. W.,
 Washington, D. C.
 Calvary Methodist Episcopal Church,
 15th & Columbia Road, N. W.,
 Washington, D. C.
 Methodist Home of the District of Columbia,
 Connecticut Avenue and Ellicott Street, N. W.,
 Washington, D. C.

Wherefore, in consideration of the premises, petitioner prays:

(1) That process be issued out of this Honorable Court, directed to Grace Middleton Herndon, Isabel Middleton Morley, George Middleton, Frederick Middleton, Rachel Mothershead Bristol (nee Rachel Mothershead), Methodist Home for Aged People of Washington, D. C., Calvary Methodist Episcopal Church of Washington, D. C., Lawrence M. Starbuck, Jr., Elizabeth Starbuck, Mary Elizabeth Whiteside, John Wilcox Whiteside, Margaret Carey Winn (nee Margaret Carey Whiteside), beneficiaries named in the will of May B. Behrens, and The Baptist Home of Philadelphia, assignee of Annie T. Bowker, commanding them and each of them to appear on a day certain and answer the exigencies of this petition, and that an order of publication be issued against each of the respondents who cannot be served with process in the District of Columbia.

(2) For the Court's instruction as to whether it shall pay interest on the principal sum remaining unpaid on the be-

quests made by May B. Behrens in Items two, three, four and five of her said will, and if so, at what rate and from what date and to what date.

14 (3) And for such other and further relief as the Court may deem proper.

THE WASHINGTON LOAN AND
TRUST COMPANY,

*Executor of the Estate of
May B. Behrens,*

By WM. H. BADEN,
Trust Officer.

ARTHUR PETER
900 F Street, N. W.

ARTHUR C. KEEFER
900 F Street, N. W.
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, ss:

Wm. H. Baden being first duly sworn upon oath deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge and belief; and that he is the Trust Officer of The Washington Loan and Trust Company, a body corporate, duly authorized by it to make this affidavit.

WM. H. BADEN

Subscribed and sworn to before me this 27th day of August, 1936.

HARRY W. GAUSS

(Seal)

Notary Public, D. C.

(Endorsement: Petition of Executor for Instructions. Filed August 27, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

15 *Answer of Mrs. Grace M. Herndon, Mr. George Middleton, Mrs. Isabel M. Morley and Mr. Frederic A. Middleton.*

The Answer of Mrs. Grace M. Herndon, Mr. George Middleton, Mrs. Isabel M. Morley and Mr. Frederic A. Middle-

ton to the Petition of the Washington Loan & Trust Company, Executor of the Estate of May B. Behrens, deceased, for instructions concerning payment of interest on certain legacies, respectfully shows unto the Court as follows:—

1. These Respondents admit the averments of the first paragraph of said Petition.

2. They admit the averments of the second paragraph of said Petition.

3. They are without knowledge of the averments of the third paragraph of said Petition.

4. They admit the averments of the fourth paragraph of said Petition.

5. They admit the averments of the fifth paragraph of said Petition.

6. They admit the averment as to part payments to these Respondents but they are without knowledge as to
16 part payments to the other Respondents.

7. They admit the averments of the seventh paragraph of said Petition.

8. They admit the averments of the eighth paragraph of said Petition. Answering further said paragraph, these Respondents respectfully aver that upon advice of Counsel they are informed and believe and therefore aver that the legacies referred to in said Petition bear interest at the rate of 6% per annum on unpaid balances until the date of final payment.

9. They are without knowledge of the averments of the ninth paragraph of said Petition.

10. They admit the averments of the tenth paragraph of said Petition.

11. They are without knowledge of the averments of the eleventh paragraph of said Petition.

12. They admit the averments of the twelfth paragraph of said Petition, except that the name of the Respondent is Frederic A. Middleton instead of Frederick Middleton as alleged in said paragraph of the Petition.

FREDERIC A. MIDDLETON
4419 Iowa Avenue, N. W.,
Washington, D. C.

J. BOND SMITH
737 Woodward Bldg.,

LUCIUS Q. C. LAMAR,
737 Woodward Bldg.

Attorneys for

Mrs. Grace M. Herndon,
2 College Lane,
Haverford, Penn.
Mr. George E. Middleton,
955 Belvidere Avenue,
Plainfield, N. J.

Mrs. Isabel M. Morley,
1 Wetherill Road,
Westmoreland Hills, Md.
Mr. Frederic A. Middleton,
4419 Iowa Avenue, N. W.
Washington, D. C.

17 DISTRICT OF COLUMBIA, ss:

Frederic A. Middleton, being first duly sworn on oath, deposes and says that he has read the foregoing Answer by him subscribed and knows the contents thereof; that the matters and facts stated of his own knowledge are true and those stated upon information and belief he believes to be true.

FREDERIC A. MIDDLETON

Subscribed and sworn to before me this 10th day of November, 1936.

WILLIAM SAPPERSTEIN

(Seal)

Notary Public.

(Endorsement: Answer of Mrs. Grace M. Herndon, Mr. George Middleton, Mrs. Isabel M. Morley and Mr. Frederic A. Middleton. Filed November 11, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

18 *Answer of Rachel M. Bristol*

The Answer of Rachel M. Bristol to the petition of the Washington Loan & Trust Company, Executors of the will of May. B. Behrens, deceased, for instructions as to payment of interest on certain legacies, respectfully shows unto the Court as follows:

1-12. This respondent admits the averments of facts in paragraphs 1 to 12, inclusive, of the petition for instructions.

Further answering the petition for instructions this respondent respectfully shows to the Court that it has been advised by counsel, and therefore avers, that the legacy to this respondent bears interest at the rate of six per cent per

annum on the unpaid balance until the time of final payment of the entire balance due.

RACHEL M. BRISTOL

PAUL B. CROMELIN
FRANCIS C. BROOKE
of Cromelin & Laws
National Press Building
Attorneys for Respondent

DISTRICT OF COLUMBIA, ss:

Rachel M. Bristol, being first duly sworn on oath deposes and says that she has read the foregoing answer by her subscribed and knows the contents thereof; that she verily believes the facts therein stated to be true.

RACHEL M. BRISTOL

Subscribed and sworn to before me this 29 day of Oct., 1936.

MARGUERITE G. DAVIS,
Notary Public. D. C.

(Seal)

(Endorsement: Answer of Rachel M. Bristol. Filed November 2, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

19 *Answer of Baptist Home of Philadelphia to
Petition for Instructions.*

The answer of Baptist Home of Philadelphia, by its attorney, to the petition of the Washington Loan and Trust Company, executor of the will of May B. Behrens, deceased, for instructions as to the payment of interest upon certain legacies, respectfully shows unto the Court as follows:

1-2. Respondent, upon information and belief, admits the allegations of paragraphs numbered 1 and 2 of the petition.

3. Respondent is without knowledge with respect to both the allegations of paragraph numbered 3 of the petition and other facts set forth in petitioner's Exhibit "A".

4. In answer to the allegations of paragraph numbered 4 of the petition, respondent respectfully refers to the will of May B. Behrens on file in this Court.

5. Upon information and belief, respondent admits the allegations of paragraph numbered 5 of the petition.

6. Answering the averments of paragraph numbered 6 of the petition, respondent says that it, as assignee of the interest of Mrs. W. H. Bowker under the will of May B. Behrens, deceased, has received only a portion of the amount to which said Mrs. W. H. Bowker is entitled under the will. Respondent admits that so much of Exhibit "B" to the petition as shows the amounts paid to Mrs. W. H. Bowker or

20 Baptist Home, Philadelphia, Pennsylvania, correctly states the portion of the bequest which has been paid either to the Baptist Home or Mrs. W. H. Bowker, and the amount of the interest which has been paid either to Baptist Home or Mrs. W. H. Bowker. Respondent is without knowledge as to the correctness of the statements contained in the other portions of Exhibit "B" to the petition.

7. Upon information and belief, respondent admits the allegations of paragraph numbered 7 of the petition.

8. Answering the averments of paragraph numbered 8 of the petition, this respondent says that it, as assignee of Mrs. W. H. Bowker, legatee under the will of May B. Behrens, deceased, is legally entitled to receive full payment of said legacy, with interest thereon at the rate of six per centum per annum from a day one year subsequent to the death of said May B. Behrens until payment thereof.

9. Answering the averments of paragraph numbered 9 of the petition, respondent says that it assumes and believes that petitioner will make proper distribution of the estate of May B. Behrens, deceased, in accordance with law and the instructions of this court, but reserves the right to bring before this court any question about which a controversy may arise between it and the petitioner.

10. Respondent is without knowledge as to the allegations of paragraph numbered 10 of the petition.

11. Respondent admits the allegations of paragraph numbered 11 of the petition.

12. Answering the averments of paragraph numbered 12, respondent admits that it is interested in the subject matter of the petition, and believes that the other persons named in said paragraph are also interested therein, but is without definite knowledge as to their interest therein or their attitude with respect thereto.

21 Wherefore, This respondent prays that the Court enter an order in this cause instructing and directing

the petitioner to pay to the respondent, as assignee of Mrs. W. K. Bowker, the full amount of the legacy directed to be paid to Mrs. W. K. Bowker under the will of May B. Behrens, deceased, together with interest at the rate of six per centum per annum upon any portion of said legacy not having been paid from a day one year subsequent to the death of said May B. Behrens until the date of payment thereof; and for such other and further relief as to the Court may seem meet and just.

BAPTIST HOME OF PHILADELPHIA
By DEAN HILL STANLEY,
Attorney

TILSON, STANLEY AND McCUEN
Shoreham Building,
Washington, D. C.

DISTRICT OF COLUMBIA, ss:

Dean Hill Stanley, being duly sworn, deposes and says that he is attorney for Baptist Home of Philadelphia, one of the respondents named in the petition for instruction filed by the Washington Loan and Trust Company, executor of the will of May B. Behrens, deceased; that he has read the foregoing answer of said respondent and knows the contents thereof; that the facts therein alleged are true to the best of his knowledge, information and belief; that the respondent is a Delaware corporation residing without the District of Columbia.

DEAN HILL STANLEY

Subscribed and sworn to before me this 12th day of November, 1936.

MARY V. JUDGE
Notary Public

(Seal)

(Endorsement: Answer of Baptist Home of Philadelphia to Petition for Instructions. Filed November 12, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

22 *Answer of the Methodist Home of the District
of Columbia*

The Answer of The Methodist Home of the District of Columbia to the petition of the Washington Loan & Trust

Company, Executors of the will of May B. Behrens, deceased, for instructions as to payment of interest on certain legacies, respectfully shows unto the Court as follows:

1-12. This respondent admits the averments of facts in paragraphs 1 to 12, inclusive, of the petition for instructions.

Further answering the petition for instructions this respondent respectfully shows to the Court that it has been advised by counsel, and therefore avers, that the legacy to this respondent bears interest at the rate of six per cent per annum on the unpaid balance until the time of final payment of the entire balance due.

THE METHODIST HOME OF THE
DISTRICT OF COLUMBIA

By HARRY HOSKINSON

President of the Board of Trustees

PAUL B. CROMELIN
FRANCIS C. BROOKE
of Cromelin & Laws
National Press Building
Attorneys for Respondent

DISTRICT OF COLUMBIA, ss:

Harry Hoskinson, being first duly sworn on oath deposes and says that he is the President of the Board of Trustees of The Methodist Home of the District of Columbia, a body corporate, and makes, acknowledges and files this answer for and on behalf of said corporation; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes the facts therein stated to be true.

HARRY HOSKINSON

Subscribed and sworn to before me this 30th day of October, 1936.

MARGUERITE G. DAVIS,

(Seal)

Notary Public, D. C.

(Endorsement: Answer of the Methodist Home of the District of Columbia. Filed November 2, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

23 *Answer of Calvary Methodist Episcopal Church.*

The Answer of Calvary Methodist Episcopal Church to the petition of the Washington Loan & Trust Company, Executors of the will of May B. Behrens, deceased, for instructions as to payment of interest on certain legacies, respectfully shows unto the Court as follows:

1-12. This respondent admits the averments of facts in paragraph 1 to 2, inclusive, of the petition for instructions.

Further answering the petition for instructions this respondent respectfully shows to the Court that it has been advised by counsel, and therefore avers, that the legacy to this respondent bears interest at the rate of six per cent per annum on the unpaid balance until the time of final payment of the entire balance due.

CALVARY METHODIST EPISCOPAL CHURCH
By ORLANDO H. SMITH

President of the Board of Trustees

PAUL B. CROMELIN
FRANCIS C. BROOKE
of Cromelin & Laws
National Press Building
Attorneys for Respondent

DISTRICT OF COLUMBIA, ss:

Orlando H. Smith, being first duly sworn on oath deposes and says that he is the President of the Board of Trustees of the Calvary Methodist Episcopal Church, a body corporate, and makes, acknowledges and files this answer for and on behalf of said corporation; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes the facts therein stated to be true

ORLANDO H. SMITH

Subscribed and sworn to before me this 19th day of November, 1936.

HARRY L. LIGHT

(Seal)

Notary Public, D. C.

(Endorsement: Answer of Calvary Methodist Episcopal Church. Filed November 20, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

To the Honorable District Court of the United States for the District of Columbia, holding a Probate Court:

The joint answer of the respondents, Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Cary Whiteside, to the petition for instructions filed herein by the Washington Loan and Trust Company, executor of the will of May B. Behrens, deceased, respectfully states to this Honorable Court:

1 and 2. Said paragraphs of said petition are admitted.

3. These respondents have no sufficient knowledge or information to either admit or deny the allegation in paragraph 3 of said petition in regard to the present financial status of the estate, and they demand strict proof thereof.

4. These respondents admit that May B. Behrens, deceased, left a last will and testament wherein and whereby she bequeathed certain sums of money to the individuals and institutions therein named, and devised and bequeathed the residue of her estate unto these respondents, but for greater certainty as to the provisions of said will respondents refer to the original thereof now on file and of record in this Honorable Court.

25 5. Your respondents admit that William H. Butler died leaving a last will and codicil thereto, as in said paragraph alleged, but for greater certainty as to the provisions thereof they refer to said will and codicil now on file and of record in this Court.

Further answering said paragraph, these respondents admit that Jenna May Butler was the only heir-at-law and next-of-kin of her father, said William H. Butler, deceased; that by marriage she became known as May B. Behrens, and that she predeceased Mary I. Butler, the life-tenant under the will of said William H. Butler. These respondents have no knowledge as to the alleged agreement entered into by the executor of the estate of May B. Behrens, and Mary I. Butler, life-tenant as aforesaid, nor as to any action taken by said petitioner, as executor aforesaid, pursuant to such alleged agreement, and if said allegations be material they call for strict proof thereof.

Further answering said paragraph, these respondents state that if such agreement as alleged therein, was made between the executor of the Behrens estate and the life-

tenant of the said Butler estate, it was made without authority while all these respondents were minors, without their consent, and without the consent of any duly appointed guardian for them, and is accordingly of no legal effect.

6. These respondents admit that the current or liquid assets of the estate of May B. Behrens were at all times, from her death on January 25, 1920 to the date of the death of Mary I. Butler, life-tenant of the estate of William H. Butler, deceased, as aforesaid, on March 20, 1936, insufficient to pay the amounts bequeathed by her last will and testament to the persons and institutions therein named. Said respondents further state that they have no knowledge or information concerning the alleged partial payments made by the executor on account of said bequests and require strict proof thereof.

26 7. These respondents admit that Mary I. Butler, life-tenant of the estate of William H. Butler, deceased, died on or about the 20th day of March, 1936. Said respondents have no knowledge or information concerning assets received by said executor from itself as trustee of the estate of William H. Butler, deceased, and if material they require strict proof thereof.

8. Said respondents admit that some of the legatees to whom May B. Behrens, deceased, bequeathed certain sums of money contend that interest should be paid on their respective bequests, and that these respondents oppose such payment, for the reason that no such interest is lawfully payable. Respondents are advised that the remaining allegations of said paragraph are conclusions of law to which they are not required to make answer.

9. Respondents are advised that it is unnecessary for them to answer said paragraph.

10. Respondents admit that their respective distributive shares of said estate of May B. Behrens would be diminished if interest were paid on the several bequests made in said will and they are advised that payment of any interest on said bequests is unauthorized, unlawful, and is contrary to said will.

11 and 12. Respondents believe said paragraphs to be true.

Further answering said petition and each and every paragraph thereof, these respondents state that May B. Beh-

rens at the time of her father's death in 1902 was not possessed of any substantial property; that her only income was derived from the estate of her father, payable to her under and pursuant to item six of her father's will, namely:

"Sixth. All the rest, residue and remainder of my property, real, personal and mixed, wheresoever and howsoever situated, now owned or that may hereafter be acquired by me, I give, devise and bequeath unto The Washington Loan and Trust Company, a corporation existing under the laws of the United States and having an office and doing business in the District of Columbia, absolutely and in fee simple, the same to be held by it in and upon the following trusts, that is to say: In trust to take charge of, manage, control, invest, sell or mortgage the same or any part thereof, and the proceeds thereof to invest and re-invest for the best interests of my estate, and the income therefrom, after the payment of taxes, insurance, repairs and other

27 necessary expenses incidental to the management of said estate, to divide into two (2) equal parts and to pay one part thereof, in monthly or quarterly installments, in its discretion, to my wife, Mary I. Butler, for and during the term of her natural life, and to pay the other part thereof to my daughter, Jenna May Butler, in the same manner, until she attains the age of fifty (50) years; but in the event of my said wife predeceasing my said daughter, my said Trustee shall pay the whole of the income from my said estate to my said daughter, Jenna May Butler, until she attains the age of fifty (50) years, at which time I hereby direct my said Trustee to pay over, transfer and deliver unto my said daughter, Jenna May Butler, or her heirs and assigns, the entire corpus of my estate then in its hands."

that they are informed and believe and therefore allege that she often anticipated the said income and frequently obtained loans and advances upon her interest in said estate, and from other sources; that at the time of her death she was indebted on account of such loans in the sum of to wit, \$1850.00; that while her will contains provision for the payment of many legacies aggregating the sum of \$100,000.00 she knew that the same could not be paid out of any property then owned by her but would be paid only if and when her father's estate was distributed.

These respondents further state they are advised, and being so advised, allege that interest on legacies, in the absence of any express provision therefor, is payable only in accordance with the presumed intention of the testatrix; that inasmuch as at the time of her death said May B. Behrens had no property and of which there might be paid the numerous legacies declared by her will, there is no basis for presuming that she intended interest to accumulate and be payable thereon if the time of payment should be postponed until the distribution of her father's estate; that on the contrary, the only reasonable inference that might be made with respect to the payment of interest on such legacies or any of them is that such interest should be paid from and after the time when the said Butler estate was payable and distributable to said May B. Behrens, to wit, upon the death of the life-tenant under said will; that accordingly any interest heretofore paid by the petitioner as executor and trustee was erroneously paid and should be charged against the said legacies and each of them, so that the estate payable to these respondents would be reduced

only to the extent of the actual amount due and payable on said legacies plus interest thereon from the 20th day of March, 1936, the date of the death of the life tenant under the will of said William H. Butler, deceased.

WHEREFORE, these respondents respectfully submit that said executor and trustee should be instructed that interest on the said several legacies bequeathed in and by the last will and testament of said May B. Behrens is payable only from the 20th day of March, 1936, at the rate of six per cent per annum, and the balance of said estate, after the payment of such legacies and interest thereon as aforesaid, is distributable and payable to these respondents as the residuary legatees and devisees under said will.

MARGARET WHITESIDE WINN
JOHN WILCOX WHITESIDE

By DELLA W. WHITESIDE
MARY ELIZABETH WHITESIDE

BRANDENBURG & BRANDENBURG

Attorneys for Respondent

719 15th Street, N. W.

Washington, D. C.

By LOUIS M. DENIT

DISTRICT OF COLUMBIA, ss:

Margaret Whiteside Winn, formerly Margaret Cary Whiteside, upon oath deposes and says that she has read the foregoing answer by her subscribed and knows the contents thereof; that the statements therein made as upon personal knowledge are true, and those made as upon information and belief she believes to be true.

MARGARET WHITESIDE WINN

Subscribed and sworn to before me this 3d day of December, 1936.

ZOE M. SHEA

(Seal)

Notary Public, D. C.

(Endorsement: Answer of Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Whiteside Winn. Filed December 3, 1936. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

29 Memorandum: Subpoena issued August 27, 1936, against Rachel Bristol, Frederick Middleton, Calvary Methodist Episcopal Church, Methodist Home of the District of Columbia, Margaret Carey Winn, nee Whiteside, Mary Elizabeth Whiteside, residents, and Grace M. Herndon, Isabel M. Morley, George E. Middleton, Lawrence M. Starbuck, Elizabeth Starbuck, Baptist Home of Philadelphia, and John Wilcox Whiteside, non-residents, to answer petition for instructions. Theodore Cogswell, Register of Wills D. C., Clerk of Probate Court.

Memorandum: Subpoena to answer returned September 17, 1936: "Served the within: Margaret Carey Winn, September 4, 1936, Methodist Home of the D. of C., by Miss Caroline Swift, Supt., Sept. 5, 1936, Frederick Middleton, September 9, 1936, Mary Elizabeth Whiteside, August 28, 1936, each personally, and Calvary Methodist Bapt. Church and 8 others, each Not to be found, September 17, 1936. John B. Colpoys, U. S. Marshal in and for the District of Columbia. By Richard A. Oden, Deputy U. S. Marshal." Filed September 17, 1936. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Affidavit of William H. Baden as to non-residence of respondents Lawrence M. Starbuck and Elizabeth Starbuck (and others). Filed September 17, 1936.

Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Order of Publication entered September 17, 1936, against Lawrence M. Starbuck and Elizabeth Starbuck, respondent (and others). Filed September 17, 1936. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Proofs of Publication in the Washington Law Reporter and The Evening Star. Filed December 14, 1936. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Affidavit of William H. Baden as to mailing of Order of Publication to Lawrence M. Starbuck and Elizabeth Starbuck (and others). Filed December 14, 1936. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Decree Pro Confesso entered against Lawrence M. Starbuck and Elizabeth Starbuck, filed December 15, 1936. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

30 Endorsed: Filed Jan 19 1937 Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court.

In the District Court of the United States for the
District of Columbia

Probate No. 26,624

In Re: ESTATE OF MAY B. BEHRENS, *Deceased*.

Decree Directing Executor to Pay Interest on Legacies

This cause coming on for hearing upon the petition of The Washington Loan and Trust Company, Executor of the Estate of May B. Behrens, for instructions and the answer of the parties in interest, upon consideration thereof and of the argument of counsel, it is by the Court this 19th day of January, 1937,

ADJUDGED, ORDERED and DECREED as follows:

1. That The Washington Loan and Trust Company, Executor of the Estate of May B. Behrens, be and it is hereby instructed that as a matter of law Grace Middleton Haddon; Isabel Middleton Morley; George Middleton; Fred-

erick Middleton; Rachel Mothershead (now Rachel Mothershead Bristol); Annie T. Bowker (described in said will as Mrs. W. K. Bowker), or her assignee, the Baptist Home of Philadelphia; Methodist Home of the District of Columbia, (described in the will of May B. Behrens as the Methodist Home for Aged People of Washington, D. C.); Lawrence M. Starbuck, Jr., and Elizabeth Starbuck, pecuniary legatees under the will of May B. Behrens, were and are entitled to receive interest at the rate of six per cent per annum on the amount of their respective legacies from and after the 25th day of January, 1921.

2. That The Washington Loan and Trust Company, Executor of the Estate of said May B. Behrens, in its final account is authorized and directed to pay the balance due on the principal sum of said legacies and each of them, together with interest thereon at the rate of six per cent per annum from and after the 16th day of March, 1927, the date to which interest has been paid.

DANIEL W. O'DONOGHUE
Justice

From the foregoing order and decree the respondents Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Carey Winn, residuary legatees, in open court note an appeal to the U. S. Court of Appeals for the District of Columbia, which is hereby allowed, and the undertaking for costs on appeal is fixed at \$100.00, or \$50.00 cash in lieu thereof.

DANIEL W. O'DONOGHUE
Justice

(Endorsement: Decree directing Executor to pay interest on legacies. Filed Jan. 19, 1937. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court).

Memorandum: Receipt of Theodore Cogswell, Register of Wills, for deposit of \$50.00 by M. Elizabeth Whiteside in lieu of an appeal bond. Filed Feb. 5, 1937. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Motion to extend time for filing Bill of Exceptions to February 26, 1937, filed February 6, 1937. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Order extending time for filing Bill of Exceptions to February 26, 1937. Filed February 6, 1937. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Memorandum: Bill of Exceptions and Notice of Submission, filed February 26, 1937. Bill of Exceptions submitted on March 24, 1937. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

32 *Assignment of Errors.*

1. The Court erred in holding that the pecuniary legatees named in the will of May B. Behrens, deceased, were entitled to receive interest at 6% per annum on the amount of their respective legacies from and after the 25th day of January, 1921.

2. The Court erred in holding that said pecuniary legatees are now entitled to receive interest at 6% per annum, from the 25th day of January, 1921, on the amount of their respective legacies.

3. The Court erred in holding that said pecuniary legatees were and are entitled to receive interest on any part of their respective legacies.

4. The Court erred in holding that said pecuniary legatees were entitled to receive interest on the unpaid portion of their respective legacies prior to March 20, 1936, the date of death of Mary I. Butler, life tenant of her husband's trust estate.

5. The Court erred in holding that said pecuniary legatees are now entitled to receive interest on the unpaid portion of their respective legacies prior to said date of March 20, 1936.

6. The Court erred in holding that said pecuniary legatees were entitled to receive interest at 6% per annum, from the 25th day of January, 1921, on the unpaid portion of principal of their respective legacies.

7. The Court erred in holding that said pecuniary
33 legatees are now entitled to receive interest at 6% per annum from the 25th day of January, 1921, on the unpaid portion of their respective legacies.

8. The Court erred in instructing the executor of the Estate of May B. Behrens, deceased, that said pecuniary legatees were and are entitled to receive interest on their

respective legacies from and after the 25th day of January, 1921.

9. The Court erred in authorizing and directing the Executor to pay the balance due on the principal sum of said legacies and each of them, together with interest thereon at the rate of 6% per annum from and after the 16th day of March, 1927.

10. The Court erred in authorizing and instructing the Executor to pay any interest on the unpaid portion of the principal sum of said legacies.

11. The Court erred in refusing to hold that no interest was payable on the pecuniary legacies provided for in said testatrix's will.

12. The Court erred in refusing to find and hold that there was no intention of the testatrix that interest should be paid on the general legacies provided for in her will.

13. The Court erred in refusing to find from the will and the circumstances surrounding the testatrix at the time of its making and at the time of her death, that the testatrix did not intend that interest should be paid on the general legacies.

14. The Court erred in imputing to the testatrix, in view of her will and the surrounding circumstances at the time of its execution and at the time of her death, an intention that interest should be paid on the general legacies provided for in her will.

BRANDENBURG & BRANDENBURG
J RICHARD EARLE
LOUIS M. DENIT

Attorneys for appellants.

(Endorsement: Assignment of Errors. Filed March 23, 1937. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

34 *Additional Assignment of Errors*

15. The court erred in holding that said pecuniary legatees were and are entitled to interest prior to March 20, 1936 on the unpaid portion of their legacies which the executor was unable to pay because of lack of funds until the death of Mary I. Butler, life tenant of the William H. Butler estate.

16. The court erred in refusing to hold that the payments made by the executor to the legatees must be charged as of their respective dates against the principal sum of the respective legacies.

BRANDENBURG & BRANDENBURG,
LOUIS M. DENIT,
J. RICHARD EARLE
By: J RICHARD EARLE
Attorneys for appellants.

(Endorsement: Additional Assignment of Errors. Filed March 29, 1937. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

35 *Designation of Record*

The Clerk will please include in the Record on appeal the following:

1. Will of William H. Butler dated December 14, 1900 and codicil thereto dated January 29, 1901 (Adm. No. 10,754).

2. Will of May B. Behrens, dated March 7, 1919.

3. Agreement between Mary I. Butler and The Washington Loan and Trust Company, Executor, for division of estate.

4. Petition of The Washington Loan and Trust Company, Executor, for instructions as to payment of interest on certain legacies.

5. Answer of Grace M. Herndon, George Middleton, Isabel M. Morley, and Frederic A. Middleton.

6. Answer of Rachel M. Bristol.

7. Answer of Baptist Home of Philadelphia.

8. Answer of Methodist Home of the District of Columbia.

9. Answer of Calvary Methodist Episcopal Church.

10. Answer of Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Cary Whiteside.

11. Memorandum entry of subpoena, issued August 27, 1936, against all respondents, to answer petition for instructions.

12. Memorandum entry of subpoena returned "not found" as to respondents, Lawrence M. Starbuck and Elizabeth Starbuck (and others).

13. Memorandum entry of affidavit by William H. Baden as to non-residence of respondents.
14. Memorandum entry of order of publication, September 17, 1936.
15. Memorandum entry of proof of publication.
16. Memorandum entry of affidavit by William H. Baden as to mailing order of publication.
17. Memorandum entry of decree pro confesso, entered December 15, 1936, against Lawrence M. Starbuck and Elizabeth Starbuck.
18. Decree of January 19, 1937 instructing executor.
19. Notation of appeal.
20. Memorandum entry of deposit of \$50.00 cash, in lieu of undertaking for costs on appeal.
21. Memorandum entry of motion to extend time for filing bill of exceptions.
22. Memorandum entry of order extending time for filing bill of exceptions.
23. Memorandum entry of filing and submission of bill of exceptions.
24. Bill of Exceptions.
25. Assignment of Errors.
- 25A Additional Assignment of Errors.
- 37 26. This Designation.

BRANDENBURG & BRANDENBURG

By: J. RICHARD EARLE

Attorneys for above named respondents, appellants.

Service of copy of the foregoing Designation of Record, admitted this 18th day of February, 1937.

ARTHUR PETER and ARTHUR C. KEEFER

By: ARTHUR C KEEFER

Attorneys for The Washington Loan & Trust Company, Executor of the Estate of May B. Behrens, deceased.

CROMELIN and LAWS

By: FRANCIS C BROOKE

Attorneys for Methodist Episcopal Church, Methodist Home of the District of Columbia, and Rachel Mothersead Bristol.

J. BOND SMITH and L. Q. C. LAMAR

By: L Q C LAMAR

*Attorneys for Grace Middleton Herndon, Isabel
Middleton Morley, George Middleton, and
Frederic A. Middleton.*

TILSON, STANLEY, and McCUEN

By: DEAN HILL STANLEY

*Attorneys for Baptist Home of Philadelphia, as-
signee of Mrs. W. H. Bowker.*

(Endorsement: Designation of Record. Filed February 19, 1937. Theodore Cogswell, Register of Wills, D. C. Clerk of Probate Court).

38 Form No. 82

District Court of the United for the District of Columbia
Holding a Probate Court

DISTRICT OF COLUMBIA, *to wit:*

I, Theodore Cogswell, Register of Wills for the District of Columbia, Clerk of the Probate Court, Do Hereby Certify the foregoing pages, numbered from 1 to 36, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 26,624 estate of May B. Behrens, deceased, wherein Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Carey Winn, are appellants, and The Washington Loan and Trust Company, Executor is appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the Designation of counsel filed therein and made a part hereof.

I Further Certify, That a cash deposit of Fifty (\$50.00) Dollars, in lieu of the bond for appeal, was duly made by said appellants, on the 5th day of February, A. D. 1937.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 21st day of April, A. D. 1937.

THEODORE COGSWELL

*Register of Wills for the Dis-
trict of Columbia, Clerk of
the Probate Court.*

(Seal)

39 Endorsed: Form 112 No..... Estate
 of Deceased. Office of
Register of Wills Clerk of the Probate Court Washington,
D. C.

40 Endorsed: United States Court of Appeals for
 the District of Columbia Filed May 4-1937 Mon-
cure Burke Clerk

 Endorsed: Filed Apr 21 1937 Theodore Cogswell, Reg-
ister of Wills, D. C. Clerk of Probate Court

 In the District Court of the United States for the
 District of Columbia

 Holding a Probate Court

 In Re: ESTATE OF MAY B. BEHRENS, *Deceased.*

 Probate No. 26,624

Bill of Exceptions.

Be it remembered that at the trial of this case before Justice Daniel W. O'Donoghue on the 14th day of January, 1937, the facts being not disputed, all parties by their counsel in open court stipulated and agreed that the whole of the probate records in the estates of William H. Butler and May B. Behrens, including the executor's petition for instructions and the answers thereto of the respondents, be and the same were received by the Court as sufficient evidence of the facts therein shown. From said records this bill of exceptions is made.

William H. Butler, a resident of the District of Columbia, died therein on the 17th day of April, 1902, leaving surviving him his widow, Mary I. Butler, and his only child and daughter, Jenna May Butler. Said decedent left a last will and testament and codicil thereto (copy of which appears elsewhere in the printed record) which were duly admitted to probate and record, and letters testamentary were issued to The Washington Loan & Trust Company, executor therein named, on the 25th day of April, 1902. Said decedent's estate was thereafter fully administered. Upon

passage and approval of the first and final account of said executor, on the 8th day of July, 1903, the balance of the personal estate amounting to \$110,819.91, consisting of bonds, stocks, notes and other personal property, was distributed to and received by said Washington Loan & Trust Company, as trustee, in and upon the trusts set forth in the sixth item of said decedent's will, as follows:

“ In trust, to take charge of, manage, control,
 41 invest, sell or mortgage the same or any part thereof,
 and the proceeds thereof to invest and re-invest for
 the best interests of my estate, and the income therefrom,
 after the payment of taxes, insurance, repairs and other
 necessary expenses incidental to the management of said
 estate, to divide into two (2) equal parts and to pay one
 part thereof, in monthly or quarterly installments, in its
 discretion, to my wife, Mary I. Butler, for and during the
 term of her natural life, and to pay the other part thereof
 to my daughter, Jenna May Butler, in the same manner,
 until she attains the age of fifty (50) years; but in the
 event of my said wife predeceasing my said daughter, my
 said Trustee shall pay the whole of the income from my
 said estate to my said daughter, Jenna May Butler, until
 she attains the age of fifty (50) years, at which time I
 hereby direct my said Trustee to pay over, transfer and de-
 liver unto my said daughter, Jenna May Butler, or her
 heirs and assigns, the entire corpus of my estate then in its
 hands.”

Said trust estate also consisted of several pieces of real estate, hereinafter referred to, owned by said decedent at the time of his death and the title to which passed to said trustee by virtue of said decedent's will.

Pursuant to the terms of said sixth item of said decedent's will, the trustee managed said trust estate and periodically distributed the net income therefrom in equal shares to said decedent's daughter and widow, until the death of the daughter in 1920.

Mrs. May B. Behrens, widow, who prior to her marriage was known as Jenna May Butler, and was the same Jenna May Butler hereinbefore referred to, died on the 25th day of January, 1920, without issue, leaving a last will and testament dated the 7th day of March, 1919, which was duly

admitted to probate and record on the 11th day of February, 1920, and letters testamentary were on said day issued to The Washington Loan & Trust Company, the executor named in said will. Since that time said testatrix' estate has been and now is in the process of administration.

At the time of her father's death in 1902, said Jenna May Butler was not possessed of any substantial property, and from that time until her own death in 1920 her only income was derived from the trust estate of her father, payable to her under and pursuant to said sixth item of his will. From time to time she anticipated said income and obtained loans and advances upon her interest in said estate, and
42 from other sources. At the time of her death she was indebted for such loans in the amount of \$2,350.00.

At the time of her death Mrs. Behrens was possessed of the following estate: (a) Jewelry and personal effects, which were specifically bequeathed to Rachel Mothershead, of the appraised value of \$5,851.55, consisting of the following: Household effects, \$2,823.05; Jewelry, \$1,951.00; Books, \$77.50; Automobile, \$1,000.00; (b) Personal estate not specifically bequeathed amounting to \$505.57, consisting of: Government bonds, \$374.42; Accrued interest on bonds \$6.98; Miscellaneous items, \$6.72; Cash, \$117.45; (c) Real estate known as premises 913 and 913½ Liberty Street, Southwest, Washington, D. C., which was sold by the executor in 1923 for \$1,750.00, and a small summer cottage and lot at Bailey Island, Maine, of the estimated value of \$1,250.00. Total real estate, \$3,000.00. In addition to the foregoing Mrs. Behrens was entitled to the interest in her father's estate given her in his will.

At the time of her death Mrs. Behrens was indebted in the sum of \$3,432.45 for the following:

Personal note to The Washington Loan & Trust Company dated December 5, 1918 for \$2,000. with 6% interest, curtailed prior to decedent's death to	\$1,350.00
Personal loan from trust estate of William H. Butler, Nov. 17, 1916, interest at 5%	600.00
Personal note to National Bank of Washington dated Dec. 13, 1919, 6% interest	275.00
Personal note to Fred L. Francis dated July 1, 1919, 6% interest	100.00

Personal loan from Fred L. Francis, by check	25.00
Funeral expenses and inscription on monument	303.75
Physicians, for professional services	75.00
Room and board	9.75
Balance of Church Pledge	152.30
Income taxes	176.85
Store accounts, merchandise	298.87
Check outstanding against decedent's bank account at time of death	2.00
Garage bill, gas and lights	63.93

By the first item of her said will (copy of which appears elsewhere in the printed record) said May B. Behrens directed her executor to pay off and discharge all debts due and owing by her at the time of her death, as soon thereafter as may be practicable. Item two bequeaths unto Grace Middleton Herndon, Isabel Middleton Morley, George Middleton and Frederic Middleton, each the
43 sum of \$5,000.00. Item three bequeaths unto Rachel Mothersead all of the testatrix' jewelry and personal effects and the sum of \$20,000.00, and unto Mrs. W. H. Bowker the sum of \$10,000.00 provided she survived the testatrix. Item four bequeaths unto the Methodist Home and the Calvary Methodist Episcopal Church, each the sum of \$20,000.00. Item five bequeaths unto Lawrence M. Starbuck, Jr. and Elizabeth Starbuck, each the sum of \$5,000.00 with the provision that should either of said legatees predecease the testatrix or die before coming into possession, through administration, of the legacy bequeathed to him or her, said testatrix bequeathed to the survivor of them the legacy bequeathed to the deceased one. Item six devises and bequeaths all the rest, residue and remainder of testatrix' estate, then owned or thereafter acquired by her, unto Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Cary Whiteside, share and share alike. Said money legacies aggregate \$100,000.00.

At the time of her death, to wit, on January 25, 1920, said May B. Behrens was about 40 years old, and her mother, Mary I. Butler, was about 60 years old. On said date Elizabeth Whiteside (born May 18, 1907) was 12 years old, John Wilcox Whiteside (born May 1, 1910) was 9 years old, and Margaret Cary Whiteside (born October 28, 1912) was 7 years old.

On the 17th day of March, 1922 Mrs. W. H. Bowker assigned the bequest made to her in said will to the Baptist Home of Philadelphia.

During the first accounting period the executor of the Behrens estate received \$23.86 income from the bonds in said testatrix' estate, and \$101.64 interest on the cash balances which resulted principally from the division of the Butler estate, hereinafter referred to.

The expenses incident to administration of said Behrens estate for the first accounting period, including interest on the decedent's loans, taxes, court costs, commissions, and miscellaneous items, amounted to \$5,720.58.

All of the testatrix' jewelry and personal effects, which she specifically bequeathed to Rachel Mothersead, amounting to \$5,851.55, were duly distributed to her by the executor, except the automobile, valued at \$1,000.00, which was disposed of by a dealer without authority and for which the executor was unable to collect.

44 On the 19th day of August, 1921 the assets comprising the trust estate of William H. Butler consisted of certain real estate, then valued at approximately \$21,000.00, and \$131,749.21 in cash. On said date an agreement (copy of which appears elsewhere in the printed record) was entered into between The Washington Loan and Trust Company in its dual capacity as trustee of the Butler estate and executor of the Behrens estate, on the one part, and Mary I. Butler, widow and surviving life tenant of the Butler trust estate, on the other part, whereby said life tenant authorized the trustee of said Butler estate to divide the cash in said estate, and as the real estate was sold to divide the proceeds thereof, into two equal parts, and to pay over one-half thereof unto itself as executor of the Behrens estate to be by it distributed under the will of May B. Behrens, and to retain the other one-half of said trust estate, to be held by said trustee under the will of William H. Butler, deceased, for Mary I. Butler for life, with remainder to the estate of said May Butler Behrens.

Pursuant to said agreement the Washington Loan and Trust Company, as trustee of the Butler estate, distributed unto itself, as executor of the Behrens estate, the sum of \$72,490.01 in cash, which included certain accrued income. Said distribution, together with the assets comprising the

estate of May B. Behrens at the time of her death, hereinbefore set forth, enabled the executor of said Behrens estate to discharge all of her indebtedness and the administration expenses, leaving a balance of \$63,968.35 on hand for distribution at the end of the first accounting period, to wit, October 20, 1921.

Out of said balance the executor of the Behrens estate, on or about December 29, 1921, distributed and paid over to the pecuniary legatees named in the second, third, fourth, and fifth items of her will the sum of \$61,250.00, of which amount \$57,000.00 was designated by the executor as being on account of principal of said legacies and \$4,250.00 as being interest. This exhausted the funds in said estate except for the sum of \$2,718.35, consisting of securities and cash, which was retained by the executor as a contingent fund.

The trustee continued the management of the William H. Butler trust estate from the date of the agreement hereinbefore mentioned, to wit, August 19, 1921, to the date
45 of death of Mary I. Butler which occurred on March 20, 1936. During said interim and according to said agreement, the trustee distributed from time to time unto itself, as executor of the Behrens estate, one-half of the net income from the real estate, and unto said Mary I. Butler, life tenant, the other one-half together with the income from the personal property remaining in said trust estate; from time to time during said interim the parcels of real estate were sold by the trustee and one-half of the proceeds thereof were distributed to the executor of the Behrens estate, the other one-half being retained by said trustee as part of the corpus of the trust estate for Mary I. Butler, for life.

The distributions so made to the executor of the Behrens estate, together with the proceeds from the sale of real estate owned by Mrs. Behrens at the time of her death, enabled said executor to make eleven other partial distributions to the pecuniary legatees named in the will of May B. Behrens, aggregating \$23,867.80, as follows: On or about October 16, 1922, \$2,580.00; September 21, 1923, \$2,294.03; December 12, 1923, \$12,721.55; April 22, 1924, \$659.70; December 9, 1925, \$608.97; May 5, 1926, \$304.47; August 17, 1926, \$2,435.84; April 8, 1927, \$608.97; June 28, 1928,

\$913.44; May 10, 1929, \$512.47; May 6, 1931, \$228.36. Said partial distributions were made by said executor promptly upon receipt of the funds and the sale of the real estate belonging to Mrs. Behrens, and when so made the funds of the estate would be exhausted except for small balances retained for contingencies. The balance in the executor's hands at the end of the last accounting period preceding the death of Mary I. Butler, life tenant, was \$1,026.83, consisting of \$439.22 in securities and \$587.61 in cash.

The total amount which has been paid by the executor to the pecuniary legatees under the will of May B. Behrens is \$85,117.80. Each of said legatees has received his or her pro rata part thereof. In its accountings to the probate court, the executor designated the amount so paid to said legatees as being \$69,551.70 on account of the principal of said legacies and \$15,566.10 as interest at six per cent on the unpaid balances of said legacies, from January 25, 1921

46 to March 16, 1927. The following set-up illustrates the payments made, and the designation thereof, by the executor of the Behrens estate in respect to a \$20,000.00 legacy:

Legacy	\$20,000.00
--------------	-------------

Payments made by executor and designated in its accountings as being on account of principal of legacy:

Dec. 29, 1921	11,400.00
---------------------	-----------

Balance	8,600.00
---------	----------

Oct. 16, 1922	258.00
---------------------	--------

Balance	8,342.00
---------	----------

Dec. 12, 1923	2,252.34
---------------------	----------

Balance	\$6,089.66
---------	------------

Payments made by executor and designated in its account-
ings as being interest on legacy.

Date	Interest at 6%				Amount
Dec. 29, 1921	1/25/21	to	10/10/21	on \$20,000.00	\$850.00
Oct. 16, 1922	10/10/21	to	4/10/22	on 8,600.00	258.00
Sept. 21, 1923	4/10/22	to	3/10/23	on 8,342.00	458.80
Dec. 12, 1923	3/10/23	to	10/10/23	on 8,342.00	291.96
Apr. 22, 1924	10/10/23	to	2/20/24	on 6,089.66	131.96
Dec. 9, 1925	2/20/24	to	6/20/24	on 6,089.66	121.80
May 5, 1926	6/20/24	to	8/20/24	on 6,089.66	60.88
Aug. 17, 1926	8/20/24	to	12/20/25	on 6,089.66	487.16
Apr. 8, 1927	12/20/25	to	4/20/26	on 6,089.66	121.80
June 28, 1928	4/20/26	to	10/20/26	on 6,089.66	182.68
May 10, 1929	10/20/26	to	1/31/27	on 6,089.66	102.48
May 6, 1931	1/31/27	to	3/16/27	on 6,089.66	45.68
Total					<u>\$3,113.20</u>

Payments were made by the executor in similar manner to all of said legatees; as to the \$5,000.00 legacies the payments were one-fourth of the amounts shown above, and as to the \$10,000.00 legacies the payments were one-half of the amounts shown above.

Upon the death of Mary I. Butler, life tenant, to wit, on the 20th day of March, 1936, the remaining one-half of the trust estate of William H. Butler became distributable, according to the terms of his will, unto his daughter, May Butler Behrens, or her heirs and assigns. Distribution thereof has been made to the executor of the estate
47 of May B. Behrens and it now has assets which are estimated to be sufficient to discharge the unpaid portion of the respective pecuniary legacies bequeathed in the second, third, fourth, and fifth items of her will, with interest thereon from March 16, 1927 to date.

The foregoing constitutes a summary of all the evidence offered by the parties, and upon which the court rendered its decree, and the respondents Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Cary Whiteside pray the court to sign and seal this as their bill of exceptions, which is accordingly done on this 21st day of April, 1937, nunc pro tunc.

DANIEL W. O'DONOGHUE
Justice

Approved:

BRANDENBURG & BRANDENBURG,
LOUIS M. DENIT, J. RICHARD EARLE
By: J. RICHARD EARLE
Attorneys for Appellants.

ARTHUR PETER and ARTHUR C. KEEFER
By: ARTHUR C. KEEFER
*Attorneys for The Washington Loan & Trust
Company, Executor of the Estate of May B.
Behrens, deceased.*

CROMELIN and LAWS
By: FRANCIS C BROOKE
*Attorneys for Methodist Episcopal Church,
Methodist Home of the District of Columbia,
and Rachel Mothersead Bristol.*

J. BOND SMITH and L. Q. C. LAMAR
By: L Q C LAMAR
*Attorneys for Grace Middleton Herndon, Isabel
Middleton Morley, George Middleton, and
Frederic A. Middleton.*

TILSON, STANLEY, and McCUEN
By: DEAN HILL STANLEY
*Attorneys for Baptist Home of Philadelphia, as-
signee of Mrs. W. H. Bowker.*

48 Endorsed: 26624 May B. Behrens decd Bill of Ex-
ceptions Doc. 61 Filed Apr 21 1937 Theodore Cogs-
well, Register of Wills, D. C. Clerk of Probate Court

Endorsed on Cover: No. 6964 Special Calendar. Mary
Elizabeth Whiteside, John Wilcox Whiteside and Marga-
ret Carey Winn, Appellants, vs. The Washington Loan and
Trust Company, Executor of the Estate of May B. Behrens.
United States Court of Appeals for the District of Colum-
bia Filed May 4-1937 Moncure Burke Clerk

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

—
No. 6964.

SPECIAL CALENDAR.

—
MARY ELIZABETH WHITESIDE, ET AL., *Appellants,*

v.

THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS, DECEASED, ET AL.,
Appellees.

—
BRIEF FOR APPELLANTS.

—
LOUIS M. DENT,
J. RICHARD EARLE,
THOMAS S. JACKSON,
Attorneys for Appellants.

BRANDENBURG & BRANDENBURG,
Of Counsel.

INDEX.

	Page
Statement of Facts	2
Assignment of Errors	7
Summary of Argument	9
No Intention to Pay Interest	9
General Rule as to Interest Inapplicable	17
Erroneous Calculation of Interest	20
Conclusion	22

TABLE OF CASES.

Caton v. American Security & Trust Co., 57 App. D. C. 279	13, 18
Earle v. Billingham, 24 Beav. 448	19
Goodman v. Palmer, 137 Tenn. 556.....	18
Herman's Estate, 220 Pa. 52	19
Van der Horst v. Van der Horst, 88 Md. 130...	18, 19
Wheeler v. Ruthven, 74 N. Y. 428.....	14
2 Page on Wills, 2d ed. 1394	17

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, ET AL., *Appellants*,

v.

THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS, DECEASED, ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the District Court of the United States for the District of Columbia, holding a probate court, allowing interest on the pecuniary legacies bequeathed in the last will and testament of May B. Behrens, deceased, and instructing her executor accordingly.

STATEMENT OF FACTS.

The facts are not disputed. Mrs. May B. Behrens, widow, died on January 25, 1920, without issue. She left a will dated March 7, 1919, which was admitted to probate on February 11, 1920. Since that time her estate has been and still is in the process of administration (R. 34, 35). The will is fully set forth in the record (R. 4).

After directing the payment of her debts as soon after her death as practicable, testatrix gave all of her jewelry and personal effects, *and the sum of \$100,000.00* to certain legatees, as follows: Item Two bequeathed to Grace Middleton Herndon, Isabel Middleton Morley, George Middleton, and Frederick Middleton, the sum of \$5,000.00 each. Item Three bequeathed to Rachel Mothersead, all of said testatrix' jewelry and personal effects, and the sum of \$20,000.00, and to Mrs. W. H. Bowker the sum of \$10,000.00, provided she survived the testatrix. Item Four bequeathed to the Methodist Home for Aged People and Calvary Methodist Episcopal Church, the sum of \$20,000.00 each. Item Five bequeathed to Lawrence M. Starbuck, Jr., and Elizabeth Starbuck the sum of \$5,000.00 each, with the provision that "*Should either of the said legatees predecease me, or die before coming into possession through administration of the legacy hereinbefore bequeathed to him or her in this the Fifth paragraph hereof, I give and bequeath to the survivor of them the legacy herein bequeathed to the deceased one.*" Item Six devised and bequeathed all the rest, residue and remainder of testatrix' estate, "*now owned or that may hereafter be acquired by me,*" unto the appellants, Mary Elizabeth Whiteside, John Wilcox Whiteside, and Margaret Cary Whiteside, share and share alike.

There was no blood relation between Mrs. Behrens and any of the persons named in her said will.

At the time of her death said testatrix was possessed of the following estate which became available to her executor for payment of her debts and the legacies provided by her said will, (R. 35):

Jewelry and personal effects *specifically bequeathed* to Rachel Mothersead, consisting of:

Household Effects	\$2,823.05
Jewelry	1,951.00
Books	77.50
Automobile	1,000.00

Total specific bequests...\$5,851.55

Personal estate *not* specifically bequeathed:

Bonds and accrued interest.....	\$381.40
Cash and miscellaneous items.....	124.17
Real estate, Premises 913-913½ Liberty Street, S. W., Washington, D. C., sold by executor in 1923 for.....	1,750.00
Small summer cottage and lot at Bailey Island, Maine, valued at	1,250.00

Total ... \$3,505.57

She owed \$3,432.45, consisting of personal loans amounting to \$2,350.00, and miscellaneous debts, \$1,082.45.

The only other asset to which she or her estate would ever be entitled was an interest in a trust fund left by her father, William H. Butler. The latter died April 17, 1902, leaving surviving him his widow, Mary I. Butler, and the testatrix herein, who was his only child

and daughter (R. 33). He left a will and codicil (R. 1) which were admitted to probate, on April 25, 1902, and letters testamentary were issued to The Washington Loan and Trust Company, the executor therein named (R. 33). His estate was administered, and upon the approval of the executor's final account on July 8, 1903, the balance of the personal estate amounting to \$110,819.91, was distributed by said executor, to itself as testamentary trustee, in and upon the trusts set forth in the sixth paragraph of the will, which reads as follows:

“ In trust, to take charge of, manage, control, invest, sell or mortgage the same or any part thereof, and the proceeds thereof to invest and re-invest for the best interests of my estate, *and the income therefrom*, after the payment of taxes, insurance, repairs and other necessary expenses incidental to the management of said estate, *to divide in two (2) equal parts* and to pay one part thereof, in monthly or quarterly installments, in its discretion, to my wife, Mary I. Butler, for and during the term of her natural life, and to pay the other part thereof to my daughter, Jenna May Butler, in the same manner, *until she attains the age of fifty (50) years*; but in the event of my said wife predeceasing my said daughter, my said Trustee shall pay the whole of the income from my said estate to my said daughter, Jenna May Butler, *until she attains the age of fifty (50) years, at which time* I hereby direct my said Trustee to pay over, transfer and deliver unto my said daughter, Jenna May Butler, *or her heirs and assigns*, the entire corpus of my estate then in its hands.” (Italics supplied.)

Said trust estate also included certain real estate, the title to which passed to said trustee by said decedent's will (R. 34).

Mrs. Behrens was 40 years old at the time of her death (R. 36). She had no substantial property when her father died, and from 1902 until 1920 her only income was derived from the trust declared by his will. From time to time she anticipated said income and obtained loans and advances upon her interest in said estate, and from other sources. At the time of her death she was indebted for such personal loans in the amount of \$2,350.00 (R. 35).

Although Mrs. Behrens, was only 40 years old at the time of her death, the Washington Loan & Trust Company *in its dual capacity* as trustee of the Butler estate and as executor of her estate, made an alleged agreement with Mary I. Butler, widow and surviving life tenant of the Butler trust fund, by which the life tenant purported to "*authorize*" the *trustee* of the Butler estate to divide the cash in said estate, together with the proceeds from sale of real estate, into two equal parts, and to pay over one-half thereof to itself *as executor* of the Behrens estate "*fully released and discharged from said trust,*" and to retain the other one-half "*under the will of the said William H. Butler, deceased, for Mary I. Butler for life, with remainder to the estate of the said May Butler Behrens*" (R. 6). When such agreement was made all of the appellants here were minors. Mary Elizabeth Whiteside was 12 years old; John Wilcox Whiteside was 9 years old, and Margaret Cary Whiteside was 7 years old. The agreement was made without authority of the Court, and appellants were not parties to it (R. 21, 22).

The trustee of the Butler estate distributed to itself, as executor of the Behrens estate, \$72,490.01 in cash (R. 38). This was added to the assets comprising the Behrens estate at the time of her death, and from the

aggregate, the executor paid her debts and administration expenses. The balance on hand at the end of the first accounting period was \$63,968.35 (R. 38). Out of this balance, on December 29, 1921, the executor paid over to the pecuniary legatees named in Mrs. Behrens' will the sum of \$61,250.00. From time to time between December 29, 1921 and May 6, 1931, several other transfers of cash were made by the trustee of the Butler estate to itself as executor of the Behrens estate, and from such funds the executor paid over to said pecuniary legatees the additional sum of \$23,867.50 (R. 38, 39). Said payments were made as soon as there were funds in hand, and when so made the funds would be exhausted except for small balances retained for contingencies (R. 39).

The total amount thus far paid to the pecuniary legatees aggregates \$85,117.80. The aggregate of their legacies is \$100,000.00. Such payments were arbitrarily designated and treated by the executor as follows: \$69,551.70 on account of the principal of said legacies; and \$15,566.10 as interest on the unpaid portion from January 25, 1921 to March 16, 1927 (R. 39, 40).

Mary I. Butler, life tenant of the Butler trust fund, died on March 20, 1936. The balance of the trust estate was distributed to the executor of the estate of May B. Behrens, which now has assets estimated to be sufficient to pay all pecuniary legacies, with interest, if allowable.

On August 27, 1936, said executor filed its petition in the court below, making all persons interested in said estate respondents thereto, and praying for instructions in respect to the payment of interest on such legacies. (R. 8) In their answers to said petition, appellants opposed the payment of interest on the money

legacies except such as had accrued after the death of Mary I. Butler, life tenant, while the appellees claimed interest from January 25, 1921 (R. 13 *et seq.*).

The trial court allowed interest on all pecuniary legacies from January 25, 1921, and directed the executor to pay the balance due on the principal of said legacies, with interest at 6 per cent from March 16, 1927 (R. 26, 27). Such payment, if made, would reduce the estate distributable to the appellants about \$32,000.00, and they have prosecuted this appeal.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the pecuniary legatees named in the will of May B. Behrens, deceased, were entitled to receive interest at 6 per cent per annum on the amount of their respective legacies from and after the 25th day of January, 1921.

2. The Court erred in holding that said pecuniary legatees are now entitled to receive interest at 6 per cent per annum, from the 25th day of January, 1921, on the amount of their respective legacies.

3. The Court erred in holding that said pecuniary legatees were and are entitled to receive interest on any part of their respective legacies.

4. The Court erred in holding that said pecuniary legatees were entitled to receive interest on the unpaid portion of their respective legacies prior to March 20, 1936, the date of death of Mary I. Butler, life tenant of her husband's trust estate.

5. The Court erred in holding that said pecuniary legatees are now entitled to receive interest on the unpaid portion of their respective legacies prior to said date of March 20, 1936.

6. The Court erred in holding that said pecuniary legatees were entitled to receive interest at 6 per cent per annum, from the 25th day of January, 1921, on the unpaid portion of principal of their respective legacies.

7. The Court erred in holding that said pecuniary legatees are now entitled to receive interest at 6 per cent per annum from the 25th day of January, 1921, on the unpaid portion of their respective legacies.

8. The Court erred in instructing the executor of the Estate of May B. Behrens, deceased, that said pecuniary legatees were and are entitled to receive interest on their respective legacies from and after the 25th day of January, 1921.

9. The Court erred in authorizing and directing the Executor to pay the balance due on the principal sum of said legacies and each of them, together with interest thereon at the rate of 6 per cent per annum from and after the 16th day of March, 1927.

10. The Court erred in authorizing and instructing the Executor to pay any interest on the unpaid portion of the principal sum of said legacies.

11. The Court erred in refusing to hold that no interest was payable on the pecuniary legacies provided for in said testatrix' will.

12. The Court erred in refusing to find and hold that there was no intention of the testatrix that interest should be paid on the general legacies provided for in her will.

13. The Court erred in refusing to find from the will and the circumstances surrounding the testatrix at the time of its making and at the time of her death, that the

testatrix did not intend that interest should be paid on the general legacies.

14. The Court erred in imputing to the testatrix, in view of her will and the surrounding circumstances at the time of its execution and at the time of her death, an intention that interest should be paid on the general legacies provided for in her will.

15. The court erred in holding that said pecuniary legatees were and are entitled to interest prior to March 20, 1936, on the unpaid portion of their legacies which the executor was unable to pay because of lack of funds until the death of Mary I. Butler, life tenant of the William H. Butler estate.

16. The court erred in refusing to hold that the payments made by the executor to the legatees must be charged as of their respective dates against the principal sum of the respective legacies.

SUMMARY OF ARGUMENT.

While the errors assigned are numerous, they present three basic propositions. In the first place, the court erred in imputing to the testatrix an intention that the legacies provided for in her will should bear interest prior to the death of the life tenant. In the second place, we contend the law does not allow interest on legacies under the circumstances of this case. In any event, interest could not be allowed as decreed. For these reasons, the decree is erroneous.

NO INTENTION TO PAY INTEREST.

The claim made by the general legatees is that they are entitled to interest after the expiration of one year from the death of the testatrix. Her will provides for

payment to them of \$100,000. By their contention, which prevailed in the lower Court, they are entitled not merely to the payment in full of their legacies but also to approximately \$32,000 more. This, they say, is what the law requires, because their legacies were not paid within a year from the date of death. They rely upon no provision in the will. The sole basis of their claim is the alleged legal obligation to pay interest arising out of the delay in paying the principal.

Our contention is that no interest was payable on the several legacies until after the death of Mrs. Behrens' mother; that to allow interest is to re-write the will and impute to the testatrix an intention which is dispelled by the circumstances existing at the time she made her will and at the time of her death. We further claim that the general rule as to the payment of interest on legacies is a rule of convenience which is never to be used for the purpose of defeating the obvious intention of the testatrix, and working an injustice.

When her father died, Mrs. Behrens was twenty-two years old. At that time she had no substantial property. Under the will, she was entitled to receive one-half of the income from his estate until she reached the age of fifty years, the other half being payable to her mother. She was not entitled to receive any part of the corpus of her father's estate until she reached the age of fifty years, and then only if her mother should be dead. Apparently the income from her father's estate was no more than necessary to defray her ordinary living expenses. She often anticipated the income and obtained loans against it. In 1916 she owed the trust estate for money advanced, and at the time of her death she was indebted to it in the sum of \$600. Three months before she made her will she borrowed from

the Washington Loan & Trust Company the sum of \$2000, and at the time of her death there was a balance due on this loan of \$1,350. In December, 1919, she borrowed \$275 from a local bank on personal notes, and was also indebted to other persons at that time. When she died the amount of personal loans and advances against personal income was \$2,350, and she owed sundry amounts for doctors' bills, store accounts, income taxes and miscellaneous items, aggregating \$1,082.45. Her total indebtedness at the time of death was \$3,432.45 (R. 35, 36).

At the time of death her property was such as might ordinarily be expected of a woman who had been living eighteen years, as it were, almost entirely upon the income from her father's estate. Her household effects, jewelry, books and automobile were valued at \$5,851.55. These items were specifically bequeathed by her will. Hence, they were withdrawn from her estate so far as the several pecuniary legacies were concerned. The balance of her property consisted of bonds and cash valued at \$505.57, an interest in a parcel of real estate in the District of Columbia which was sold for \$1,750, and a small summer cottage in Maine, valued at \$1,250. The total property owned by her not specifically bequeathed aggregated \$3,505.57. There is no evidence that any substantial change in the nature or amount of her property occurred between the time when she made her will and the date of her death. Therefore, it may be fairly assumed that what she had in January, 1920, she also had in March, 1919, when she made her testamentary disposition. *Blake v. Hawkins*, 98 U. S. 324. After deducting the property specifically bequeathed there remained in her estate property valued at \$3,505.57. This property was subject to the payment

of her debts amounting to \$3,432.45. The net estate, therefore, available for the payment of cash legacies was \$73.12, and this amount was subject to the payment of administration expenses. With \$100,000 in cash legacies the question arises, from what source, and when, could they be paid?

Our position is that these legacies were intended and could only be paid when there should be a distribution of the corpus of the Butler estate. The testatrix had no other money with which to pay. Her executor was limited exclusively to the Butler estate. The testatrix knew this. She knew the terms of her father's will and had taken benefits under it for approximately eighteen years. She had been dealing with the trustee of that estate in respect to financial matters for a considerable time. Her provision for gifts amounting to \$100,000. was predicated upon the assumption that they would be paid if and when the Butler estate was distributed. In fact, the testatrix seems to have realized that distribution of the Butler estate might be postponed for an unusual length of time. With respect to the legacies given by item five she expressly provides, "*Should either of said legatees die before coming into possession through administration of the legacies bequeathed to him or her * * * I give and bequeath to the survivor of them the legacy herein bequeathed to the deceased one.*" The two legatees mentioned were then residing with their parents, which would indicate youth rather than age. Evidently Mrs. Behrens thought there would be delay before her executor could pay the legacies and she accordingly provided for survivorship in case either of these two legatees should die before receiving payment. In view of this express language on her part, and the circumstances which existed at the time she

made her will, and at the time it took effect, we submit that payment of the pecuniary legacies was intended to be postponed until there were funds with which to pay. This event occurred and could only occur when there was a distribution of the Butler estate, either to the testatrix or to the executor of her estate.

Our contention is not only rooted in common sense, but is sustained by the authorities. In *Caton v. American Security and Trust Company*, 57 App. D. C., 279, the testator bequeathed money legacies aggregating \$200,000. His executor could not pay these legacies until certain stock had been sold as directed by the will. The testator died in 1908. The executor sold the stock in 1926. It was met with the claim by the legatees that they were entitled to interest on their legacies from one year after the testator's death. In affirming a decree of the lower court which disallowed such interest, this court said:

"It appears that, if all the property owned by the testator had been sold within a period of several years after his death, the proceeds of the sale would have been insufficient to satisfy more than the debts, the provisions for the widow, and about 50 per centum of the legacies to the relatives and friend. In other words, but for this provision deferring the sale of the stock, there would have been nothing with which to satisfy the deferred legacies. This provision deferring the sale discloses full appreciation on the part of the testator of the condition of his estate, and subsequent events have vindicated his judgment, for by deferring the sale of the stock the trustee now has in hand funds sufficient to pay all the legacies in item eighteenth and provide a substantial residuary fund.

It thus becomes apparent that the testator, not only knew that the legacies in item eighteenth *could not* be paid unless or *until the stock was sold*,

but intended to provide and did provide that *such payment should not be made until that time.*

* * * *

The payment of legacies under item eighteenth *being deferred* until the sale of the stock, and it appearing that there was no unreasonable delay in making such sale, interest was not allowable on those bequests. *To allow interest would be to more than double bequests which, but for the delay, could not have been paid at all.*" (Italics supplied)

It may be suggested that in the *Caton case, supra*, express provision was made for the disposition of the stock and accordingly a time fixed for realizing the fund out of which the legacies could be paid. Here, inability to pay the legacies arose out of the facts which confronted the Executor when it qualified. The testatrix knew what those facts were. In the light of that knowledge, she provided for the payment of legacies aggregating \$100,000, without mentioning interest. She did not designate the time when these legacies were to be paid, but that was fixed by the conditions then existing of which she had knowledge and with respect to which the rights of the legatees must be governed. These were just as effective in this case as the express provision in the *Caton case*, since in no event could there be any money to pay the legacies until there was a distribution of the Butler estate.

In *Wheeler v. Ruthven*, 74 N. Y. 428, the will provided for twenty-one pecuniary legacies aggregating \$31,500, and directed that the first fifteen (amounting to \$28,500) should have a preference over the other six. The testatrix left no estate out of which the legacies could be paid at the end of the administration year. She was, however, entitled to an interest under her father's will, subject to a life estate in her mother. The

mother survived the testatrix by twelve years, and upon her death the Executors took possession of that residuary estate. The pecuniary legatees claimed interest on their legacies from the expiration of one year from the death of the testatrix. The lower court rejected this claim and held that interest did not commence to run until the residuary estate came into possession. On appeal, this judgment was affirmed. The court said:

“The question we are to decide is whether the legacies in this case are to be deemed due and payable at the end of the year, from the testatrix’s death, so as to bear interest from that time, according to the general rule, or are they taken out of the general principle by the will and the surrounding circumstances. If the legacies are deemed to be due and to bear interest after a year, and the interest, as well as the principal of the preferred legacies, is to be first paid, nothing will be left with which to pay the six remaining legacies, as the whole estate will be absorbed in the prior payments. It would be a question worthy of consideration, assuming that the legacies became due at the end of the year, whether the priority given by the will to the first fifteen legacies attaches to the interest which should accrue by delay of payment, and whether the subsequent legatees would not be entitled to be paid the principal of their legacies before applying the estate to satisfy the accrued interest on the primary legacies. But we do not deem it necessary to decide this point, for the reason that the decree of the surrogate may be affirmed on the ground that the legacies did not become payable so as to bear interest until the falling in of the life estate of the testatrix’s mother. The will does not in terms refer to the time when the legacies are payable, or direct that they shall be paid with interest. It must be assumed that the testatrix understood the condition of her prop-

erty, and that until the death of her mother, she or her representatives could have no beneficial enjoyment of her estate, and that meanwhile the life tenant was entitled to the possession and the whole income. When the life estate would terminate was uncertain. It might terminate within a year after the death of the testatrix, or continue, as in fact it did, for several years after that period. There was no fund out of which the legacies could be paid during the life-time of the mother. The very nature and character of the estate of the testatrix prevented earlier payment. No want of diligence on the part of the executor in getting in the assets, or any resistance on the part of debtors, could have any influence in delaying payment, so long as the life estate was outstanding. The mother surviving the daughter, there was no basis for the presumption on which the rule that a legacy is payable within a year after the testator's death is founded. It was impossible that the executor could get in the assets within a year, unless the mother should happen to die within that time, and there was no ground for the presumption of her death at any particular period.

“The circumstances of the case fairly lead to the inference that the testatrix designed and intended that the legacies should be paid when, by the death of her mother, her estate should vest in possession, and that she did not intend that the legacies should draw interest during the pendency of the life estate, while her estate was earning no interest, and when an allowance of interest might result in depriving a part of her legatees of any benefit under the will.”

In other words, where it plainly appears that pecuniary legacies can only be paid when a certain event happens, failure to make payment prior to the happening of the event creates no right to interest. This is true whether the testatrix makes express provision for

creating the fund at a particular time, or whether the facts existing at the time of her death plainly demonstrate the necessity for postponement until funds are realized with which to pay. So, in the *Caton case*, *supra*, this court rejected the claim for interest because the money with which to pay the legacies could not be realized until the date specified by the testator. And, in *Wheeler v. Ruthven*, *supra*, the claim of interest was rejected because the legacies could not be paid until after the expiration of the life estate, which fixed the time when the estate of the testatrix would come into possession and enjoyment. Here, the conditions existing at the time the will took effect precluded payment of these several legacies and, therefore, postponed the running of interest until the estate of Mrs. Behrens should come into possession.

GENERAL RULE AS TO INTEREST INAPPLICABLE.

Furthermore, appellees' claim to interest should be rejected because it involves an unconscionable result. The rule, with reference to allowing interest on legacies, is based upon practical considerations. It is the result of an implication of law. The rule never applies unless two things are apparent (1) that funds are available with which to pay at the close of the administration year and (2) circumstances showing that the testator intends payment to be made at that time. Therefore, the policy underlying the rule is to encourage the prompt payment of legacies and the expeditious administration of estates. (2 Page on Wills, 2d ed. 1394.)

As against residuary legatees, the rule has no application when it tends to work an inequitable result. In

such case an exception is made. This is shown in *Goodman v. Palmer*, 137 Tenn. 556. The question there involved was whether interest was allowable on legacies, the payment of which was prevented by prolonged litigation over the will. The court said:

“To allow the fixed legacies to be paid, with interest calculated under the general rule, would probably be to deny the residuary legatee any part of the bounty the testator intended to bestow upon that charity. The general rule is too rigid to produce a just result when it would thus frustrate the testator’s intention.

“The rule was adopted as one of convenience, and when in operation it tends to work out an inequitable result, an exception to it should be raised. That which was intended to serve as a mere convenience in *ordinary* circumstances should not govern where the situation is different.”

The same principle was recognized and applied by this Court in *Caton v. American Security and Trust Company, supra*. In that case, the Court said:

“The general rule undoubtedly is that legacies begin to draw interest one year after the death of the testator, at which time, in the absence of any provision in the will, they are presumed to be payable. 28 R. C. L. 353; 40 Cyc. 2094; *Powell v. Drake*, 19 D. C. 334; *Budd v. Garrison*, 45 Md. 418. *But this rule has no application where the will, as a whole, interpreted in the light of the surrounding circumstances, discloses a different intent on the part of the testator.*” (Italics supplied.)

In *Van der Horst v. Van der Horst*, 88 Md. 130, the testator gave \$10,000 to certain grandchildren which he declared “is to be paid to them as they respectively arrive at the age of majority, but should, however,

either one or more of said children die before arriving at the age of majority, then the share to which such child would have been entitled if living, shall go into the residue of my estate." The principal question was whether these legacies bore interest. The court said:

"We have a case, therefore, of an ordinary pecuniary legacy, payable upon a contingency at a future period, with no directions respecting interest in the meantime, *with no circumstances existing to indicate that interest was intended to be paid*, and with no relation existing between the testator and the legatees from which the law would imply that interest was properly payable. In these conditions, the duty of the administrators c. t. a. will be fully discharged when they shall pay to the legatees at the time named in the will, the precise sums bequeathed to them.

To require in the meantime the payment of interest would, *in effect, add a provision to the will which is not there now*; or would imply that the testator intended interest to be paid because of the existence between him and the legatees of the relation of parent and child though there is not the slightest evidence that such a relation did in fact exist." (Italics supplied.)

To the same effect are *Herman's Estate*, 220 Penn. 52; *Earle v. Billingham*, 24 Beav. 448.

In view of the foregoing, we respectfully submit that the general rule as to the allowance of interest on legacies has no application to this case. Its operation here would produce an inequitable result. It would also be contrary to the evident intention of the testatrix, and would involve an addition of language to her will which was never used or authorized to be placed there.

ERRONEOUS CALCULATION OF INTEREST.

Assuming, but not conceding, that interest is properly allowable, under the protection of the learned court below, the executor and pecuniary legatees have pursued a course most beneficial to them. The record shows there were twelve payments made to the pecuniary legatees. The first was made on December 29, 1921, and further payments were made annually through 1929. Each time a payment was made the amount was credited first to accrued interest and the balance on account of principal. The residuary legatees were not consulted, nor did they directly or indirectly approve what was done. So far as the several legatees are concerned, the method followed increases the interest paid or payable to them to the extent of approximately \$8,900.00. The following statement is made in order to present a visual picture of the method followed and how it injures the residuary legatees:

Payments Amount	Date	Balance Principal	Interest 6% from Jan. 25, 1921
.....	1/25/21	\$20,000.00	to 12/29/21 \$1,113.34
\$12,250.00	12/29/21	7,750 00	to 10/16/22 592.09
516.00	10/16/22	7,234.00	to 9/21/23 403.91
458.80	9/21/23	6,775.20	to 12/12/23 91.45
2,544.31	12/12/23	4,230.89	to 4/22/24 91.67
131.96	4/22/24	4,098.93	to 12/ 9/25 400.99
121.80	12/ 9/25	3,977 13	to 5/ 5/26 96.85
60.88	5/ 5/26	3,916.25	to 8/17/26 66.57
487.16	8/17/26	3,429.09	to 4/ 8/27 132.02
121.80	4/ 8/27	3,307.29	to 6/28/28 242.52
182.68	6/28/28	3,124.61	to 5/10/29 162.48
102.48	5/10/29	3,022 13	to 5/ 6/31 360.60
45.68	5/ 6/31	2,976.45	to 3/20/36 870.58
<u>\$17,023.55</u>		Totals	<u>\$4,625.07</u>
2,976.45	Balance due		
<u>\$20,000.00</u>			

SUMMARY.*

Legatees claim:

Amount heretofore paid them, and designated as:

Principal (R. 39)	\$13,910.34
Interest (R. 40)	3,113.20
Balance of principal (R. 39)	6,089.66
Interest on \$6,089.66 from March 16, 1927, to March 20, 1936	3,292.42
	<u>\$26,405.62</u>

Appellants say:

Amount heretofore paid to be credited to principal.

pal.	\$17,023.55
Balance of principal	2,976.45
Interest on unpaid principal from Jan. 25, 1921, to March 20, 1936	4,625.07
	<u>24,625.07</u>

Difference on a \$20,000 legacy.....	\$1,780.57
For \$100,000 of legacies multiply by 5.....	X 5

Total difference	<u>\$8,902.85</u>
------------------------	-------------------

*Computations to date of death of Mary I. Butler, March 20, 1936.

As we see it, instead of crediting payments to accrued interest and applying the balance to principal, all payments should have been applied to principal as and when made, and the interest, which was and still is a debatable matter, should have been permitted to accumulate.

CONCLUSION.

In conclusion, we submit that Mrs. Behrens never directed the payment of interest on any legacies provided by her will. She used no language from which may be legitimately inferred a purpose that such interest should be paid. On the contrary, the circumstances under which her will was made and which existed at the time of her death, demonstrate clearly that the legacies were to be paid if and when she received distribution from her father's estate. Until that event happened, none of the legacies were to be paid, and until that time happened they could not be paid. Therefore, it is only from and after the happening of that event that interest may properly be chargeable against the residuary estate. The general rule applicable to ordinary cases does not apply in this case. It would operate, if applied, to produce a result which the testatrix never intended and which would be unconscionable as against the residuary legatees. It would materially increase the amount payable to the general legatees far above that which Mrs. Behrens intended. Interest as allowed was erroneously computed. For these reasons, we submit that the decree should be reversed and this case remanded with instructions to enter a decree disallowing interest.

Respectfully submitted,

LOUIS M. DENIT,
J. RICHARD EARLE,
THOMAS S. JACKSON,
Attorneys for Appellants.

BRANDENBURG & BRANDENBURG,
Of Counsel.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 18 1937
IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, ET AL., *Appellants*,

v.

THE WASHINGTON LOAN AND TRUST COMPANY, Executor
of the Estate of MAY B. BEHRENS, Deceased, ET. AL.,
Appellees.

**BRIEF ON BEHALF OF APPELLEE, THE WASH-
INGTON LOAN AND TRUST COMPANY, EX-
ECUTOR.**

ARTHUR PETER,
ARTHUR C. KEEFER,

*Attorneys for The Wash-
ington Loan and Trust
Company, Executor of
the Estate of May B.
Behrens.*

INDEX.

	Page
Statement	1
Synopsis of Will of May B. Behrens.....	3
Facts	3
Statement of Position of This Appellee.....	6
Calculation of Interest	7
Conclusion	9

TABLE OF CASES.

Hamilton v. Shillington, 19 App. D. C. 275.....	6
Story v. Livingston, 13 Peters, 359.....	8
Hammond v. Hammond, 2 Bland (Md. Chancery Reports) p. 369	8

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, ET AL., *Appellants*,

v.

THE WASHINGTON LOAN AND TRUST COMPANY, Executor
of the Estate of MAY B. BEHRENS, Deceased, ET AL.,
Appellees.

**BRIEF ON BEHALF OF APPELLEE, THE WASH-
INGTON LOAN AND TRUST COMPANY, EX-
ECUTOR.**

STATEMENT.

The appellee, The Washington Loan and Trust Company, as executor of the will of May B. Behrens, deceased, presented a petition to the District Court of the United States for the District of Columbia, holding Probate Court, praying for instructions as to whether

interest should be paid on legacies bequeathed by the 2nd, 3rd, 4th and 5th items of the will and, if so, at what rate and from what date to what date. By said items of said will legacies aggregating \$100,000 were bequeathed to various persons and corporations. The executor made partial payments to the pecuniary legatees and at the time of filing its petition for instructions \$85,117.80 had been paid to the pecuniary legatees. Each of the legatees received his or her pro rata part thereof. The payments were designated by the executor as follows: \$69,551.70 on account of the principal of said legacies, and \$15,566.10 as interest on the unpaid balance of said legacies from January 25, 1921 to March 16, 1927 (R. 39, 40). The payment in full of the principal of said legacies was delayed under the circumstances as hereinafter described (R. 38, 39).

Various legatees, in answer to the petition, claimed that interest should be paid on the legacies (R. 13, 14, 15, 16, 17, 18, 19) while Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Carey Whiteside, the residuary legatees, opposed the payment of interest except from March 20, 1936 (R. 21, 22, 23, 24).

Thereupon, Mr. Justice O'Donoghue of the District Court of the United States, holding Probate Court, after hearing, held that the pecuniary legatees were entitled to receive interest at the rate of 6 per cent per annum on the amount of their respective legacies from and after the 25th day of January, 1921, (that being one year after the death of May B. Behrens) and directed the executor to pay the balance due on the principal sum of said legacies with interest at the rate of 6 per cent from and after the 16th day of March, 1927, the date to which interest had been paid (R. 26, 27). A decree was entered to that effect (R. 26, 27) and the

residuary legatees have appealed to this Court to reverse such decree (R. 27).

SYNOPSIS OF WILL OF MAY B. BEHRENS.

Briefly, the will of May B. Behrens, dated and executed the 7th day of March, 1919, contained the following provisions:

Item One: Directs payment of debts.

Item Two: Bequests unto Grace Middleton Hernon, Isabel Middleton Morley, George Middleton and Frederick Middleton of \$5,000 each.

Item Three: Bequests of \$20,000 and all jewelry and personal effects unto Rachel Mothershead, and \$10,000 unto Mrs. W. H. Bowker.

Item Four: Bequests unto the Methodist Home for Aged People, Washington, D. C., and the Calvary Methodist Episcopal Church of \$20,000 each.

Item Five: Bequests unto Lawrence M. Starbuck, Jr., and Elizabeth Starbuck of \$5,000 each, with provision that if either of them should die before coming into possession of the legacy the survivor should take the amount bequeathed to such deceased legatee.

Item Six: All the rest, residue and remainder of the estate devised and bequeathed to Mary Elizabeth Whiteside, John Wilcox Whiteside and Margaret Cary Whiteside.

Then testatrix appointed The Washington Loan and Trust Company as executor of her will.

FACTS.

May B. Behrens died on the 25th day of January, 1920. Her will described above was duly admitted to probate on the 11th day of February, 1920, and letters testamentary issued to this appellee, which has ever

since performed its duties in connection with the administration of the estate (R. 34, 35, 36, 37, 38).

At the time of her death, May B. Behrens owned certain miscellaneous property specifically bequeathed of the aggregate value of \$5,851.55 and personal and real estate not specifically bequeathed or devised of the value of \$3,505.57. At the time of her death, May B. Behrens was indebted in the sum of \$3,432.45. In addition to these assets, she was entitled to the share in her father's estate given her in his will (R. 35).

William H. Butler, died April 17, 1902, leaving surviving his widow, Mary I. Butler and the said May B. Behrens, nee Jenna May Butler, his only child (R. 33). He left a will and a codicil thereto (R. 1, 2) which were admitted to probate on the 25th day of April, 1902, and letters testamentary were issued to The Washington Loan and Trust Company, and thereafter the said estate was fully administered (R. 33). Upon the approval of its first account on July 8, 1903, the balance of the personal estate of William H. Butler, amounting to \$110,819.91, was distributed to and received by The Washington Loan and Trust Company, as trustee, in and upon the trusts set forth in Item 6 of the will of William H. Butler (R. 34). In addition to the personal estate said trustee also became vested with the title to certain real estate owned by William H. Butler at the time of his death (R. 34). Thereafter the trustee managed the estate and distributed the income until the death of May B. Behrens in 1920 (R. 34). May B. Behrens, nee Jenna May Butler, at the time of her death on January 25, 1920, was forty years of age (R. 36). On the 19th day of August, 1921, the assets comprising the trust estate of William H. Butler consisted of real estate valued at approximately \$21,000 and

\$131,749.21 in cash (R. 37). An agreement was entered into on this date between The Washington Loan and Trust Company, as trustee of the Butler estate and as executor of the Behrens estate, on the one part, and Mary I. Butler, widow and surviving life tenant of the Butler trust fund, who was entitled to one-half of the income from the Butler Trust under paragraph 6 of the will of William H. Butler (R. 2), whereby the trustee of said Butler estate was authorized to divide the cash and as the real estate was sold to divide the proceeds thereof into two equal parts and to pay one-half unto the executor of the Behrens estate and retain one-half under the will of William H. Butler. Pursuant to said agreement the Butler trust fund was divided and the trustee distributed unto The Washington Loan and Trust Company, as executors of the Behrens estate, the sum of \$72,490.01 in cash (R. 37). This enabled the executor to discharge all of the indebtedness of May B. Behrens, pay the administration expenses, and left a balance of \$63,968.35 for distribution (R. 38) on the 20th day of October, 1921. Out of this balance, the executor on or about the 29th day of December, 1921, distributed and paid to the pecuniary legatees \$61,250, of which \$57,000 was designated by the executor as being on account of principal of said legacies and \$4,250 as interest (R. 38). Thereafter and until May 6, 1931, the executor of the Behrens estate made eleven partial distributions to the pecuniary legatees aggregating \$23,867.80 (R. 38). The total amount paid by the executor to the pecuniary legatees is \$85,117.80, of which the executor designated \$69,551.70 on account of principal and \$15,566.10 as interest on unpaid balance of legacies from January 25, 1921 to March 16, 1927 (R. 39).

Mary I. Butler, life tenant, died on March 20, 1936, and thereupon the Butler trust estate was distributed to the executor. At the time of filing its petition for instructions, the executor had assets estimated to be sufficient to discharge the unpaid portion of the pecuniary legacies with interest, if allowable (R. 40).

STATEMENT OF POSITION OF THIS APPELLEE.

At the hearing below on the petition and the answers thereto, all the parties in interest, except Lawrence M. Starbuck, Jr. and Elizabeth Starbuck, were present in Court and represented by counsel. After the hearing, and by a decree of the Court, the executor was instructed that interest at the rate of 6 per cent per annum was payable on all the bequests contained in items 2, 3, 4 and 5 of the will.

This appellee felt from the outset and still feels that it is entirely neutral in the dispute that has arisen between the pecuniary and residuary legatees named in the will.

This appellee is vitally interested in having this question determined by a Court of competent jurisdiction so that it will be protected in paying or refusing to pay interest on the legacies bequeathed by items 2, 3, 4 and 5 of the will of May B. Behrens. If it should be found that interest is not payable on said legacies and the executor was in error in making partial payments to the pecuniary legatees and designating a portion thereof as interest, the executor respectfully requests this Court to order and direct that its accounts be revised and corrected. The executor feels that as long as the estate is open, its accounts are subject to revision and correction. This question has been passed upon by this Court in the case of *Hamilton v. Shilling-*

ton, 19 App. D. C. 275, in which this Court, in the course of its opinion, said:

“In this same connection it may be noticed that objection was taken in the court below by the appellees that the appellants came too late with their petition. We find no force in this objection. The law on the subject was fully stated by the Court of Appeals of the State of Maryland in the case of *Bantz v. Bantz*, 52 Md. 686, in which it was said:

‘As long as the estate is open, that is, not finally closed and settled, the accounts of the executor in the Orphans’ Court are subject to revision and correction in respect of any matter discovered to be erroneous * * * The simple passage of a claim by the Orphans’ Court or the passage and approval of an account pertaining to it does not establish the correctness of either.’

* * * * *

“And in the case of *Wilson v. McCarty*, 55 Md. 277, the same court said:

‘The jurisdiction of the Orphans’ Court to correct an account within a reasonable time has been frequently upheld in this court. What is reasonable time depends upon the peculiar circumstances of each case, and the character of the corrections to be made.’ ”

CALCULATION OF INTEREST.

If this Court should find that interest is properly allowable, the executor submits that the method of applying the partial payments to interest and principal as set forth in the appellants’ brief on pages 20 and 21 is correct. Each time a payment was made the amount was credited, first, to accumulated interest and the balance on account of the principal. The rule for comput-

ing interest where the debt carries interest is stated by the Supreme Court of the United States in the case of *Story v. Livingston*, 13 Peters, 359, at page 371, as follows:

“The correct rule in general is, that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable whether the debt be one which expressly draws interest, or on which interest is given in the name of damages.”

Chancellor Bland in the case of *Hammond v. Hammond*, 2 Bland (Md. Chancery Reports) at page 369, states the rule for computing interest as follows:

“The rule for computing interest, in all cases, where the debt carries interest; and the debtor has made partial payments, is, that the interest is calculated from the time the debt becomes payable, down to the day of the first payment; and the interest is added to the principal, then the payment is deducted from the whole; and if such payment satisfies the whole interest and a part of the principal then the interest is calculated upon the balance of the principal to the day of the second payment, from the whole of which the second payment is deducted, etc. But if the first payment does not discharge the whole interest, then after applying it to the satisfaction of so much of the interest, the interest is calculated upon the principal only, until the day of the second payment, which is deducted from the whole amount, and so on. So that in no way is any interest calculated and paid upon interest. *Frazier v. Hyland*, 1 H. & J. 98; *Gwinn v. Whitaker*, 1 H. & J. 754.”

CONCLUSION.

Appellee has endeavored to make a fair statement of the facts and has called attention to the foregoing authorities in an effort to aid this Court in its consideration and determination of the matters in dispute between the parties to this proceeding. The executor sought and still seeks instructions as to how it should distribute the estate of May B. Behrens now in its hands and respectfully requests that it be advised:

1st. Whether interest is payable on the pecuniary legacies mentioned in items 2, 3, 4 and 5 of the will of May B. Behrens.

2nd. If it is found that interest is payable on the pecuniary legacies, what method should be used in calculating the amount thereof.

Respectfully submitted,

ARTHUR PETER,

ARTHUR C. KEEFER,

Attorneys for The Washington Loan and Trust Company, Executors of the Estate of May B. Behrens.

FILED OCT 22 1937

Monroe Burke

IN THE

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

April Term, 1937.

No. 6964.
Special Calendar.

MARY ELIZABETH WHITESIDE, ET AL.,
Appellants,

v.

THE WASHINGTON LOAN AND TRUST COM-
PANY, EXECUTOR OF THE ESTATE OF
MAY B. BEHRENS, DECEASED, ET AL.,
Appellees.

**BRIEF FOR BAPTIST HOME OF PHILA-
DELPHIA, APPELLEE.**

DEAN HILL STANLEY,
*Attorney for Baptist Home
of Philadelphia, Assignee of
Mrs. W. H. Bowker,
Shoreham Building,
Washington, D. C.*

TILSON, STANLEY & McCUEN,
Of Counsel.

CONTENTS.

	Page
STATEMENT	1
QUESTION INVOLVED	6
ARGUMENT	6
Interest is Legally Payable upon the General Legacies in Mrs. Behrens' Will from One Year Subsequent to Her Death Until Paid	6
CONCLUSION	24

TABLE OF CASES.

Bonham vs. Bonham, 38 N. J. Eq. 419	21
Caton vs. American Security and Trust Company, 57 App. D. C. 279	17
Kent and Dunham vs. Dunham; 106 Mass. 586 ...	20
Koon's and Wright's Appeal, 113 Pa. St. 621	19
Lansburgh vs. Lansburgh, 59 App. D. C. 201	18
Lather's Will, In re, 243 N. Y. Supp. 380 to 384 ..	17
Rutherford, Matter of, 196 N. Y. 311	14
Powell vs. Drake, 18 Mackey (19 D. C.) 334	6
Reid vs. Dodge (Supreme Court D. C.), 43 W. L. R. 546	9
Wheeler vs. Ruthven, 74 N. Y. 428	11
White's Will, In re, 221 N. Y. Supp. 532	17
Wood, In re Estate of, (Supreme Court D. C.), 54 W. L. R. 778	9

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

April Term, 1937.

No. 6964.
Special Calendar.

MARY ELIZABETH WHITESIDE, ET AL.,
Appellants,
v.

THE WASHINGTON LOAN AND TRUST COM-
PANY, EXECUTOR OF THE ESTATE OF
MAY B. BEHRENS, DECEASED, ET AL.,
Appellees.

BRIEF FOR BAPTIST HOME OF
PHILADELPHIA, APPELLEE.

STATEMENT.

This is an appeal by the residuary legatees in the will of one May B. Behrens, deceased, from a decree of the District Court of the United States for the District of Columbia (R. 26) instructing the executor of

that will to pay upon general legacies provided in the will interest at the rate of six per centum per annum from January 25, 1921. The decree was entered after the executor had filed a petition for instructions upon the subject and various general residuary legatees had filed answers and submitted the controversy to the determination of the court.

Mrs. May B. Behrens died in the District of Columbia on January 25, 1920 (R. 34). She left a last will and testament dated March 7, 1919, which was admitted to probate in the Supreme Court of the District of Columbia on February 11, 1920 (R. 25).

Mrs. Behrens' will (R. 4) is very simple. The first paragraph provides for the payment of all just debts. The second paragraph bequeaths \$5,000.00 to each of four persons. The third paragraph bequeaths to still another person all jewelry and personal effects and the sum of \$20,000.00, and to still another person the sum of \$10,000.00. The fourth paragraph bequeaths to a home for the aged in Washington and a Washington church each \$20,000.00. The fifth paragraph bequeaths to two persons the sum of \$5,000.00 each, and, unlike the other paragraphs, provides that should either of these legatees pre-decease the testatrix or die before coming into possession, through administration, of the legacies, the survivor should take the legacy provided for the deceased one. The sixth paragraph leaves the residue of the estate to three persons, appellants herein. The seventh and last paragraph nominates an executor.

The foregoing is in substance the sum total of the provisions in Mrs. Behrens' will.

At the time of her death Mrs. Behrens was possessed of real and personal estate valued at \$9,357.12 (R. 35), and an interest in the estate of her father given her by his will (R. 35).

The interest of Mrs. Behrens in her father's estate was created in the following manner and was of the character indicated:

Mrs. Behrens was the daughter of William H. Butler, who died testate in the District of Columbia on April 17, 1902 (R. 33). Mr. Butler, in his will (R. 1 ff.), after making certain general and specific legacies, bequeathed and devised the residue of his estate to a trustee with power to invest and reinvest the corpus, and to divide the income from the trust into two equal parts, one of which was to be paid in monthly installments to Mr. Butler's wife during her life, and the other to his daughter, Mrs. Behrens, until she was fifty years of age. It was further provided that should the wife pre-decease the daughter the entire income from the trust was to be paid to Mrs. Behrens until she became fifty years of age, when the entire corpus of the trust was to be paid to her absolutely.

Mr. Butler's will, it will be noted, did not specifically provide what disposition was to be made of the trust estate in the event Mrs. Behrens, the daughter, pre-deceased her mother, whatever might be the legal import of the language creating the trust as to such a contingency.

The event which apparently Mr. Butler did not anticipate was in fact what occurred. Mrs. Behrens pre-deceased her mother, who did not die until March 20, 1936 (R. 38).

Mrs. Behrens was forty years old at the time of her death, and her mother was at that time sixty years old (R. 36).

At the time Mrs. Behrens made her will, therefore, on March 7, 1919 (R. 34), she was thirty-nine years old, and, presumably, anticipated living for many years and certainly outliving her mother. Presumably, Mrs. Behrens, when making large legacies in her will, expected that by the time of her death the corpus of her father's estate would have come into her possession.

On August 19, 1921, the executor of Mrs. Behrens estate and the trustee under Mr. Butler's will (who were, in fact, the same trust company) entered into an agreement (R. 6-8), which provided that one-half of the cash and one-half the proceeds of the real estate, when sold, in the Butler trust should be paid to the executor of the Behrens estate, and the other half of each retained by the trustee in the Butler estate and the income thereon paid to Mrs. Butler during her life.

By this agreement, Mrs. Behrens' executor received \$72,490.01 (R. 37) and paid to legatees, at the end of the first accounting period, a total of \$57,000.00 on the principal of their legacies, and a total of \$4,250.00 as interest on the unpaid portions of the legacies (R. 38).

Thereafter, between the first accounting period, and March 16, 1927, the executor of Mrs. Behrens estate, as a result of money received under the above described agreement, made payments on principal on December 29, 1921, October 16, 1922, and December 12,

1923 (R. 39), aggregating \$69,551.70, and payments of interest on unpaid balances of legacies amounting to \$15,566.10 (R. 39). There were in all twelve payments of interest, which paid the interest on unpaid balances down to March 16, 1927 (R. 40).

After these payments on principal and interest, Mrs. Behrens' estate was exhausted except for small balances retained for contingencies (R. 39), until the death of Mrs. Butler on March 20, 1936, when the other half of the corpus of the trust created by the will of Mrs. Behrens' father, William H. Butler, was paid to Mrs. Behrens' executors.

With the money received from the Butler trust, Mrs. Behrens' executor is able to discharge the unpaid portions of the general legacies bequeathed by Mrs. Behrens, with interest thereon from March 16, 1927, the date of the last interest payment, to date (R. 40).

This appellee's specific interest in the case occurs by reason of the assignment to it by Mrs. W. H. Bowker (R. 37) of the general legacy of \$10,000.00 provided for Mrs. Bowker in Mrs. Behrens' will. Three payments of the principal, on the dates hereinbefore indicated when payments on principal of all general legacies were made, aggregating \$6,955.17 (R. 39, 40), leaving a balance on the principal of the legacy of \$3,045.00 unpaid. Interest in the amount of \$1,556.60 has been paid, leaving interest from March 16, 1927, still unpaid, if the contention of appellees herein is sustained.

QUESTION INVOLVED.

The question involved in this case is whether or not the general legatees mentioned in Mrs. Behrens' will are entitled to interest on their respective legacies from one year subsequent to the death of Mrs. Behrens until paid. The general legatees contend that they are entitled to such interest, whereas the residuary legatees assert that such interest should not be paid because Mrs. Behrens' executors did not have money with which to pay it until the death of Mrs. Behrens' mother and the consequent ending of her life interest in the Butler estate, which brought the remaining corpus of that estate to Mrs. Behrens' executor.

ARGUMENT.

Interest is Legally Payable upon the General Legacies in Mrs. Behrens' Will from One Year Subsequent to Her Death Until Paid.

The general principle recognized and followed in this jurisdiction for many years is that interest is payable on a general legacy from a date one year after the death of the testator until paid, unless it clearly appears from the will that the testator did not intend that interest should be paid.

The leading case in his jurisdiction is *Powell vs. Drake*, 18 Mackey (19 D. C. 334), in which it appeared that the testator died January 15, 1885. A caveat to his will was filed asserting that the testator, at the time of making the will, was of unsound mind that that undue influence had been used to procure the execution

of the will. The will was sustained and ultimately the decision was affirmed by the Supreme Court of the United States on March 3, 1890, over five years after the testator's death. In the meantime, on November 9, 1885, letters testamentary had been issued and the executor had qualified. After the close, in 1890, of the litigation attacking the will, the general legatees made claim for their legacies with interest at six per centum from one year after the testator's death. The executor claimed that the delay caused by the litigation was not of his making and that the payment of interest on the general legacies would decrease the residuary estate and made the executor liable for the deficiency. The Court held that regardless of the circumstances, interest was payable on the general legacies from one year subsequent to the testator's death, and said:

“But it is laid down by all the authorities that by the common law all legacies are payable at the expiration of one year from the death of the testator, *unless otherwise directed in the will*; although they vest, in the absence of provision to the contrary, at his death; and as interest is allowed upon money due from the time it is properly demandable, it would seem in accordance with general principle it should be chargeable upon a money legacy after the expiration of the year from the testator's death.”

* * * * *

“This rule is adopted for the benefit of the legatee, ‘and follows’, as was said in 106 Mass. 591, ‘as an accretion to the principal legacy.’

“General legacies are preferred to residuary legacies and are never to abate in their favor, and will be paid in full, though it may exhaust the assets and destroy the claim of the residuary legatees. *Neither should interest upon them be denied in favor of those claiming under the residuary clause.*”

* * * * *

“Fortunately the provident management of the estate prevented all loss of interest on the funds during the litigation.

*“But the right of the legatees to receive interest is quite independent of this consideration. The cases show that if there had been a total loss of income from the investments during the period, the pecuniary legacies would still bear interest; and it matters not how prolonged may be the contest that delays the payment of the legacies. * * **

There was no time, according to the contention of the executors, until the decision of the Supreme Court, when they could have paid any of these legacies, and thus the legatees were obliged during this time to lose the use of their money, notwithstanding the earnest wish of the testator, as manifested by the last clause in his will for the immediate settlement of his estate. This justifiable prudence of the executors was not exercised for the sake of the legatees, who would willingly have receipted for their legacies, with interest properly payable, at any time after the expiration of the year.” (Italics supplied.)

Powell vs. Drake has been consistently followed in this jurisdiction. *Reid vs. Dodge* (Supreme Court D. C.) 43 W. L. R. 546. *In Re Estate of Wood* (Supreme Court D. C.) 54 W. L. R. 778.

The residuary legatees in the case at bar contend (1) that because the executor was unable to pay the general legacies until he received the corpus of the Butler estate after the death of the life tenant, interest was not payable, and (2) that because it must be presumed that the testatrix knew when she made her will that her estate would not be sufficient to pay the general legacies she, therefore, did not intend, although there is no indication to that effect in the will, that the general legacies she provided should bear interest until the corpus of the Butler estate came into her estate.

The appellants' first contention will be answered by an examination of the cases hereinafter discussed.

The palpable fallacy and fundamental error underlying the appellants' second contention is that they wish the court to raise a presumption that Mrs. Behrens, when she made her will in 1919, when she was thirty-nine years old and her mother was fifty-nine years of age, assumed that she would die before her mother and thereby bring about the situation which in fact occurred. If the court is to indulge in any presumption, the natural one would clearly seem to be that Mrs. Behrens, a much younger woman than her mother, would, in making her will, be proceeding upon the assumption that her mother would die probably many years before she did. If this event had occurred, the entire corpus of the Butler estate would,

in fact, have fallen to Mrs. Behrens' executor at her death and there would immediately have been ample funds with which to pay all general legacies. It certainly would not be the usual thing for a child, in the conduct of its usual affairs in life, to proceed on the assumption that he would pre-decease his parents. These considerations clearly dispose of the reiterated contention of the appellants that Mrs. Behrens, at the time she made her will, must have realized that her estate would be inadequate at her death to pay the general legacies.

One other tenuous argument made by appellants must be mentioned before a discussion of the cases. Appellants point out that in the fifth paragraph of her will (R. 5) Mrs. Behrens, after providing a general legacy of \$5,000.00 to each of two persons, proceeded in the same paragraph to provide that "should either of said legatees pre-decease me, or die before coming into possession through administration of the legacy hereinbefore bequeathed to him or her in this the fifth paragraph hereof", the legacy of the deceased one should go to the survivor. It is argued from this provision that Mrs. Behrens must have understood when she made her will that there would be delay in the payment of legacies. In the first place, this provision appears only in the fifth paragraph, which provides for two general legacies of \$5,000.00 each, whereas all the paragraphs which provide for general legacies, aggregating almost \$100,000.00, do not have this provision. Had Mrs. Behrens been somewhat more careful in her punctuation the meaning of what would, even so,

seem apparent, would be perhaps clearer. Had she placed a comma after "possession" and another comma after "administration" in the clause quoted, the meaning might have been a little clearer. However, there is little doubt as to what she meant. She palpably did not have any reference to administration of her father's estate. What she meant was that should one of the legatees mentioned in the paragraph die before her or before her estate had been administered, clearly meaning the usual term of administration, then the survivor should take.

It, therefore, clearly appears that there is nothing in Mrs. Behren's will to indicate in any way that she did not expect her legacies, in the usual course of events, to be paid within one year after her death.

Appellants rely principally, to support their contention, upon the case of *Wheeler vs. Ruthven*, 74 N. Y. 428. A careful examination of this case is necessary in order to show, even assuming, although not conceding, that the case supports appellants' contention, that the same court which decided the case in fact overruled it in another and much better considered opinion. In *Wheeler vs. Ruthven*, the testatrix died August 20, 1862, leaving a will in which she bequeathed twenty-one general legacies, amounting to \$31,500.00. She directed that in case her real and personal estate was not sufficient to pay all the legacies, the first fifteen mentioned, amounting to \$28,500.00, should first be paid and the balance of her estate, if any, should be applied pro rata to the remaining six. A niece of the testatrix, who was one of the aforementioned fifteen

legatees, was also made residuary legatee. The testatrix's estate consisted solely of a residuary interest under the will of her father, in a fund of \$30,000.00, and in an undivided half of a house and lot in which the mother of the testatrix was, by the will of the father, given a life interest. The testatrix's mother survived her and died in 1874, at which time the mother's life interest in the father's estate terminated and the estate came to the testatrix's estate, thus permitting the payment of legacies. The question was whether interest should be payable during the period between the testatrix's death and the time when the life tenancy in the father's estate terminated. While the court held that interest was not payable during that period, it re-affirmed the general principal as to payment of interest. In this case the court said:

“The general rule is well settled that where a general legacy is given without assigning any time for payment, it bears interest from the expiration of a year after the death of the testator. This rule has been established for convenience and is founded upon the presumption that within that time the executor will have been enabled to ascertain the condition of the estate, to collect the assets, and be prepared to pay the legacies.”

* * * * *

“It is a legitimate consequence of an omission by the executor to pay a legacy when payment is due, that the legacy should bear interest from that time, as a compensation for the delay; and

therefor the time when the legacy is payable determines the time from which interest commences.”

* * * * *

“The will is to govern when it speaks upon the subject, and the time of payment may be accelerated or postponed at the will of the testator. But the rule does not yield to doubtful indications in the will of an intention of the testator at variance with it. As where a legacy is given, payable out of money due on a mortgage ‘when recovered,’ the legacy will be deemed to be payable after the lapse of a year, and will bear interest from that time, and the right to interest will not be postponed, in case the executor has not meanwhile been able to collect the security. (*Wood v. Penoyre*, 13 Ves. 326). A legacy, according to the general rule, will be payable and bear interest after a year from the testator’s death, although by reason of the deficiency of assets, the inability of the executor to collect the debts, or other accidental circumstances, payment at that time may be impractical. (*Wood v. Penoyre*; *Sitwell vs. Bernard*; *Williams on Executors*, 1285.)”

The reason the court gave for disallowing interest was the inability of the executor to pay interest until he received the money from the father’s estate, and the fact, as the court assumed, that the testatrix must have realized that her legacies could not be paid until the life tenancy in her father’s estate terminated.

The court thus fell in what it is respectfully submitted was the error of assuming that a daughter would expect, at the time she made her will, to die before her mother. If anything, the contrary should have been assumed.

But the important point is that in another case, decided a number of years later the same New York court in fact overruled *Wheeler vs. Ruthven*, although in a surfeit of politeness it endeavored to distinguish the two cases. The later case is *Matter of Rutherford*, 196 N. Y. 311. In that case the testatrix died July 2, 1900, leaving a will in which she bequeathed four general legacies. Each legacy was to be paid in full in the order in which the legatees were named, "each legacy to be paid in full before paying any subsequent named legatee so that the said legacies are not to abate as between themselves." The residuary estate was bequeathed to a daughter of the testatrix.

At the time the testatrix made her will and at the time of her death she was the owner of one-third of the principal of a trust fund held by her, and subsequently by her and another as trustee under the will of her late husband, the income to be paid to the testatrix and her daughter and the survivor. The daughter survived her mother and drew the income from the trust created by her father until 1904, when she died and the corpus came to the testatrix's estate. In the meantime, Isabella Rutherford, one of the last of the above four legatees named in the testatrix's will, had not been paid in full because there were not sufficient assets in the testatrix's estate to pay the legacies until

the death of the testatrix's daughter. When the daughter died, terminating her life tenancy in her father's estate, and that estate fell to the estate of the testatrix, the executors of the testatrix offered to pay Isabella Rutherford the principal of the legacy but refused to pay interest on the legacy during the time that the estate was awaiting the termination of the life tenancy in the other estate. Isabella Rutherford brought proceedings to require the executor to pay interest during this period.

Before proceeding to what the court decided, it must be pointed out that it is intellectually impossible to distinguish the facts in the *Rutherford case* and the facts in *Wheeler vs. Ruthven*. In both instances the payment of a legacy was postponed until the estate received funds from another estate at the termination of a life interest.

In the *Rutherford case*, however, the court held that interest was payable regardless of the fact that the executor could not pay the interest because he had no funds until the life interest had terminated. The court said:

“If payment of a legacy is to be postponed beyond the time provided by statute (one year after death), the intention of the testator so to postpone such payment must be found in the will itself when interpreted in connection with circumstances surrounding the testator at the time of making his will.

“Whether the assets of the estate have been

fruitful or unproductive does not affect the right of the legatee. He is in the same position as a creditor and entitled to be awarded interest at the legal rate for such time as he is kept out of his demand."

Rather than categorically state what in fact it did, namely, overrule *Wheeler vs. Ruthven*, the court distinguished the two cases as follows:

"In the case before us the testatrix had, apart from her contingent expectant interest in the estate of her husband, an estate of substantial amount, from which a portion of the legacies were paid, and there is nothing in the will to indicate an intention that some of the legacies should be payable at one time and some at another, or that the legacies should become due and payable by the executor as he received the assets of the estate."

The fact remains, however, that the circumstances of both cases are identical except for the possible distinction the court points out that in *Wheeler vs. Ruthven*, the testatrix had no money in her estate to pay legacies, whereas in *Matter of Rutherford* there was some money, but a very inadequate sum, with which to make partial payments of legacies. This, it is submitted, however, is not an adequate distinction between the two cases.

That *Matter of Rutherford* did in fact overrule *Wheeler vs. Ruthven* is indicated by subsequent deci-

sions in the New York courts where, under similar circumstances, *Matter of Rutherford* has, since its decision, been followed. For example, in the case of *In Re White's Will*, 221 N. Y. Supp. 532, decided in 1927, a legacy to a son payable in 1910 could be paid only in part because of lack of assets in the estate. In 1924 a life tenancy ended in another estate and the estate in question secured the corpus of the other estate, thus enabling it to complete the payment of the legacy. Under these circumstances, which are identical with the circumstances in the case at bar, the New York court followed *Matter of Rutherford* and allowed interest on the son's legacy from 1910.

See also *In re Lather's Will*, 243 N. Y. Supp. 380, to 384, decided in 1930.

It thus appears that *Wheeler vs. Ruthven* is no longer law in the State of New York, if it ever was law for any purpose than the particular case which it decided, and that *Matter of Rutherford* has established the law in New York as the following shows it is elsewhere.

Some reliance is placed by appellants on the case of *Caton vs. American Security and Trust Company*, 57 App. D. C. 279. This case, however, re-affirmed the rule established by *Powell vs. Drake*, *supra*, although this court held that the will involved clearly, by its terms, indicated an intention on the part of the testator that interest should not be paid until the happening of certain events. The will in that case provided:

“that my executor shall not sell or dispose of my stock in the Greater New York Development Company or the Brooklyn Development Company, or stock in any New York Company which I may own, until such time as an adequate price, as near as may be the par value thereof, can be obtained, it being my belief that this stock will, in the near future, be a valuable asset of my estate.”

Mr. Justice Robb said in the opinion:

“This general rule undoubtedly is that legacies begin to draw interest one year after the death of the testator, at which time, in the absence of any provisions in the will they are presumed to be payable—28 R. C. L. 353; 40 Cyc. 2094; *Powell vs. Drake*, 19 D. C. 334; *Rudd vs. Garrison*, 45 Md. 418. But this rule has no application *where the will*, as a whole, interpreted in the light of the surrounding circumstances discloses a different intent on the part of the testator.” (Italics supplied).

In *Lansburgh vs. Lansburgh*, 59 App. D. C. 201, this court again recognized the general rule, saying:

“It is the general rule that, unless otherwise provided by the will, or by statute, interest is payable on a general legacy, from the time when the legacy ought to be paid until the time it is paid.”

In the case at bar there is nothing whatsoever in the will of the testatrix to indicate that she intended that interest should not be paid on the legacies. Perhaps the scope of the rule as to interest is most clearly shown in the case of *Koon's and Wright's Appeal*, 113 Pa. St. 621. In that case the testator, during his lifetime, created a trust providing for the payment of annuities to himself and others. The testator died in 1858. The trust did not terminate until 1884. The testator provided in his will for certain legacies and left the residue of his estate to certain persons, and included in the residue anything that might come into the estate when the trust was wound up. The assets of the estate were insufficient to pay legacies until the trust expired and the proceeds of the trust were paid into the estate. The question was whether or not legacies should bear interest for the entire period of time during which they remained unpaid. The court held that the legatees were entitled to full interest from a date one year after the death of the testator, and that the fact that the trust funds were necessary to full liquidation of the legacies "is adventitious only, and not vitally essential to the right of the legatee to have the legacy". The court said:

"In reality those funds (the trust fund) constituted the chief, though not the only, source of the means for paying the legacy, but the gift of the legacy was absolute, and without condition that it should come from that source. Had there been other estate sufficient for the purpose, the existence or the non-existence, of the trust funds,

would have been irrelevant in fact, as well as in theory. *The circumstances that they were essential to the full liquidation of the legacy is adventitious only, and not vitally essential to the right of the legatee to have the legacy.* The surplus of the trust funds not needed for the trust comes to the executors as part of the residue of the estate, and is only made applicable to the payment of the appellee's legacy by the residuary clause. But the legacy itself was completely given by the preceding clause of the will, and the legal right to have it exists by virtue of that clause and not necessarily by virtue of the residuary clause at all." (Italics supplied.)

In *Kent and Dunham vs. Dunham*, 106 Mass. 586, suits were brought against an administrator for interest claimed to be due on a legacy. The testator died in 1857 providing in his will legacies for his wife, daughter and the children of his son. The principal amounts of the legacies were paid in 1868 without prejudice to the right of the legatees to bring action for interest thereon. At the trial the administrator offered evidence to prove, amongst other things, that the failure to pay the legacies until 1868 was due to the fact that the real estate of the testator, which made up the entire estate, except household furniture and property allowed to the widow "at the time of his death, was either heavily encumbered by mortgage or the absolute title thereof was in other persons who had claims against it; * * * and that

they (the administrators) had no assets available for the payment of the debts of their testator, and of the charges of executing his will and administering his estate, before March 1, 1863". This evidence was excluded by the lower court, which held "that on all the legacies simple interest should be allowed from the date of the probate of the will". The Supreme Judicial Court affirmed the lower court's decision in all particulars except the holding as to the date from which the interest should begin to run. This the court held should be one year from the death of the testator. The court said:

"Interest is payable upon pecuniary legacies from the time when, by the terms of the will or by the rules of law, they become due and ought to be paid. *It is incident to the principal demand, and not imposed upon the executor for his neglect.*

"*Evidence offered to justify or excuse the executor, in not paying the legacies at an earlier date, was properly rejected as immaterial.*

* * * * *

"The general rule, already stated, is founded upon the principle that interest follows as an accretion to the principal legacy, and does not depend upon demand or default." (Italics supplied.)

In *Bonham vs. Bonham*, 38 N. J. Eq. 419, the court, in order to carry out the testator's intention

in respect of support for the widow, adjudged that payment of general legacies should be postponed until after the death of the widow. The question was whether interest ran upon general legacies during the interim. The court held that regardless of the inability of the executors to pay interest during the lifetime of the widow, interest, nevertheless, ran on the legacies from one year from the death of the testator, because the legacies were vested at death.

From the foregoing decisions the correct rule may be formulated without any equivocating limitations. Certainly the rule is not based, in any degree, upon the ability or the inability of the executor to pay the interest at any specific time. While the rule has been frequently stated as a rule with a limitation, namely, that interest accrues from one year after the date of the testator's death unless a contrary intent appears in the will, the rule might better be stated as being that interest runs on a legacy from the time it is due, bearing in mind that where a contrary intent is not expressed the legacy is due one year after date of death. Of course, the testator may always determine the date when the legacy is to be due.

In other words, a legatee is in precisely the same situation, as far as interest is concerned, as a creditor. As was said in *Matter of Rutherford*, supra,

“Whether the assets of the estate have been fruitful or unproductive does not affect the right of the legatee. *He is in the same position as a creditor* and entitled to be awarded interest at

the legal rate for such time as he is kept out of his demand.” (Italics supplied.)

Once a legacy is given, it *ipso facto* draws interest from the date it is due, regardless of whether assets are in the possession of the executor at a given time or not. The legacy is due either one year after death, or at such time as the testator indicates in the will it shall be due.

The rule is clear, and the application to the case at bar would seem to be equally clear. The testatrix, Mrs. Behrens, made no provision whatsoever in the will as to when legacies were to be paid. She simply provided for legacies. Therefore, the legacies were due one year after her death and interest accrued thereon from that date. The legatee standing in the same position of a creditor, as was set out in *Matter of Rutherford*, the accrual of interest is not affected by the adventitious circumstances (*Koon's and Wright's Appeal, supra*) that the executor did not have assets to pay interest until years after the legacies became due. Had there been creditors of the estate, interest on their claims certainly would not have been affected by the fact that the executor did not have assets with which to pay the debts until 1936. In like manner, the right of the legatees to interest can in no way be affected by such circumstances.

Nor will any effort to project oneself into the mind of Mrs. Behrens at the time she made her will, and discover what her mental processes then were, alter the situation. If the appellants are entitled to

their guess that Mrs. Behrens, at thirty-nine years of age, when she made her will, must have contemplated that she would pre-decease her mother, who was then fifty-nine, and that her legacies, therefore, could not, in fact, be paid until the Butler trust ended, then the appellees are equally entitled to *their* guess to the effect that Mrs. Behrens, when she made her will in 1919, when she had not yet reached middle age, must have contemplated that her mother, in the usual course of nature, would pre-decease her, and, therefore, when she died, the entire Butler trust would be immediately at the disposition of her executor. If guesses are to be indulged in, certainly the guess of the appellees is more apt to be correct.

CONCLUSION.

From the foregoing discussion it is clear that the District Court was correct in holding that interest is payable upon the legacies for which provision is made in Mrs. Behrens' will. The decree of the District Court should, therefore, be affirmed.

Respectfully submitted,

DEAN HILL STANLEY,
Attorney for Baptist Home of Philadelphia, as Assignee of Mrs. W. H. Bowker,

Shoreham Building,
Washington, D. C.

TILSON, STANLEY AND McCUEN,
Of Counsel.

October, 1937.

FILED NOV 5 - 1937

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, JOHN WILCOX WHITESIDE
AND MARGARET CAREY WINN, *Appellants*,

v.

THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS.

**BRIEF FOR GRACE MIDDLETON HERNDON, ISA-
BEL MIDDLETON MORLEY, GEORGE MID-
DLETON, FREDERIC A. MIDDLETON, RA-
CHEL M. BRISTOL, THE METHODIST HOME
OF THE DISTRICT OF COLUMBIA AND CAL-
VARY METHODIST EPISCOPAL CHURCH,
APPELLEES.**

PAUL B. CROMELIN,
FRANCIS C. BROOKE,
Of CROMELIN & LAWS,
*Attorneys for the Methodist Home of the
District of Columbia, Calvary Methodist
Episcopal Church and Rachel M. Bristol,
Appellees.*

J. BOND SMITH,
L. Q. C. LAMAR,
*Attorneys for Grace Middleton Herndon,
Isabel Middleton Morley, George Middle-
ton and Frederic A. Middleton,
Appellees.*

INDEX

	Page
Statement of Facts	1
Questions Involved	5
Argument	5
Interest Was Properly Allowed from One Year after the Decedent's Death	5
Interest Was Properly Computed by the Execu- tor and by the Court	12
Conclusion	13

CASES CITED

Boyce, In Estate of, 173 Wis. 575	12
Caton v. American Security & Trust Company, 57 Appl. D. C. 279	6, 10, 11, 12
Forster's Will, In re, 195 Wis. 58	11, 12
Peck's Estate, In re, 96 Vt. 183	11
Powell v. Drake, 19 D. C. 334	6, 12
Reid v. Dodge, 43 W. L. R. 546	6
Rutherford, In re, 196 N. Y. 311	11
Wheeler v. Ruthven, 74 N. Y. 428	6, 11
White's Will, In re, 221 N. Y. S. 532	11

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, JOHN WILCOX WHITESIDE
AND MARGARET CAREY WINN, *Appellants*,

v.

THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS.

**BRIEF FOR GRACE MIDDLETON HERNDON, ISA-
BEL MIDDLETON MORLEY, GEORGE MID-
DLETON, FREDERIC A. MIDDLETON, RA-
CHEL M. BRISTOL, THE METHODIST HOME
OF THE DISTRICT OF COLUMBIA AND CAL-
VARY METHODIST EPISCOPAL CHURCH,
APPELLEES.**

STATEMENT OF FACTS.

This is an appeal from a decree of the District Court of the United States for the District of Columbia on a petition filed by the Washington Loan and Trust Company, Executor of the estate of May B. Behrens, de-

ceased, for instructions. On the petition the Court below entered a decree directing the payment of interest on general pecuniary legacies to the date of payment.

The decedent, May B. Behrens, who before her marriage was Jenna May Butler, died January 25, 1920, leaving a will, the provisions of which will be hereinafter more fully set forth. At the time of her death, in addition to her interest in a trust estate created by her father's will, she was seized and possessed of household effects, jewelry, books and an automobile of a total value of \$5,851.55, which were specifically bequeathed by her, and other personal property and real estate not specifically bequeathed of the total value of \$3,505.57. The interest in the trust estate created by her father's will is more particularly described in the next succeeding paragraph. Her total indebtedness at the time of her death was \$3,432.45.

The decedent's father, William H. Butler, died April 17, 1902, leaving surviving Mary I. Butler, his widow, and the decedent, then known as Jenna May Butler, his daughter and the stepchild of his widow. His will after making several devises and bequests not here in question provided as follows:

"Sixth. All the rest, residue and remainder of my property, real, personal and mixed, wheresoever and howsoever situated, now owned or that may hereafter be acquired by me, I give, devise and bequeath unto The Washington Loan and Trust Company, a corporation existing under the laws of the United States and having an office and doing business in the District of Columbia, absolutely and in fee simple, the same to be held by it in and upon the following trusts, that is to say: In trust to take charge of, manage, control, invest, sell or mortgage the same or any part thereof, and the proceeds thereof to invest and re-invest for the

best interests of my estate, and the income therefrom, after the payment of taxes, insurance, repairs and other necessary expenses incidental to the management of said estate, to divide into two (2) equal parts and to pay one part thereof, in monthly or quarterly installments, in its discretion, to my wife, Mary I. Butler, for and during the term of her natural life, and to pay the other part thereof to my daughter, Jenna May Butler, in the same manner, until she attains the age of fifty (50) years; but in the event of my said wife predeceasing my said daughter, my said Trustee shall pay the whole of the income from my said estate to my said daughter, Jenna May Butler, until she attains the age of fifty (50) years, at which time I hereby direct my said Trustee to pay over, transfer and deliver unto my said daughter, Jenna May Butler, or her heirs and assigns, the entire corpus of my estate then in its hands."

Mary I. Butler, the widow, survived the decedent herein and did not die until March 20, 1936.

The will of the decedent herein bequeathed a total of \$100,000.00 to certain general legatees, the appellees herein and left the residue to the appellants. None of the legatees, general or residuary, are dependents of the decedent nor is there any evidence in the record to show a particular love, affection or desire to benefit any legatee over any other legatees except such as might be inferred from the four corners of the will. The decedent executed her will on March 7, 1919. At that time she was about thirty-nine years old and Mary I. Butler was about fifty-nine years old. At the date of the decedent's death, she was forty and Mary I. Butler was about sixty years old.

At the time the trust fund was created the value of the assets which comprised it was approximately

\$110,819.91 (R. 34). On August 19, 1921, the assets comprising the trust estate consisted of real estate valued at \$21,000.00 and cash amounting to \$131,749.21.

On the 19th day of August, 1921, the Washington Loan and Trust Company in its dual capacity as trustee of the Butler estate and as executor of the Behrens estate, and the said Mary I. Butler made an agreement whereby the said Mary I. Butler authorized the Washington Loan and Trust Company as trustee to divide the cash in the trust estate into two equal parts and as the real estate in said trust estate was sold to also divide the proceeds thereof into two equal parts and as soon as practical to pay one-half of said cash, and when and as the real estate was sold, pay one-half of the proceeds thereof to the Washington Loan and Trust Company as executor of the estate of May B. Behrens the other one-half of the cash to be held by the said Washington Loan and Trust Company as trustee under the said will of William H. Butler, deceased, for Mary I. Butler, for life, with the remainder to the estate of the said May B. Behrens. (R. 37, R. 6-8.) Pursuant to the said agreement the Washington Loan and Trust Company shortly thereafter distributed to itself as executor of the Behrens Estate the sum of \$72,490.01. From time to time thereafter it sold real estate as a result of which it received additional sums of cash. As a result the Washington Loan and Trust Company as executor has been able to pay to the general legatees the sum of \$85,117.80, \$69,551.70 of the said amount being denominated by it at the time of payment as payments on account of the principal of the legacies and the remainder of \$15,566.10 as interest. In other words, each legatee has received payments denominated by the executor on account of principal totaling approx-

imately 69.5 per cent of the principal of his legacy. On its computations interest was paid to March 16, 1927.

As a result of the death of Mary I. Butler, on March 20, 1936, the remainder of the corpus of the trust estate created by the will of William H. Butler became payable to the estate of May B. Behrens with the result that there is now an ample amount on hand to pay the general legatees the remainder of the principal together with interest at 6 per cent to the date of payment and leave a balance for distribution to the residuary legatees.

The court below held that interest on the general pecuniary legacies was payable from one year after the date of the decedent's death and that interest is now payable from March 16, 1937, the last date to which interest was paid. The Appellants appeal from this decree.

QUESTIONS INVOLVED.

Although there are several contentions raised by the appellants ^{by} that can be classified under two headings.

The first question is whether interest should be paid on the general legacies from one year after the death of the decedent.

The other question is whether the payments made on account of legacies were properly applied first to interest and then to principal.

ARGUMENT.

Interest Was Properly Allowed from One Year After the Decedent's Death.

There is no question but that in this jurisdiction interest is allowed a general pecuniary legacy from one year after the death of the decedent until the legacy is

paid in full. *Powell v. Drake*, 19 D. C. 334; *Reid v. Dodge*, 43 W. L. R. 546; *Caton v. American Security and Trust Company*, 57 App. D. C. 279. The rule is well stated in *Powell v. Drake*, *supra*, as follows:

“General legacies are preferred to residuary legacies and are never to abate in their favor, and will be paid in full, though it may exhaust the assets and destroy the claim of the residuary legatees. *Neither should interest upon them be denied in favor of those claiming under the residuary clause.*” (Italics supplied.)

The Appellants recognize the general rule. They do not and cannot contend that there was any indication that the testatrix by reason of relationship or love or affection intended that any one legatee should be preferred over any one other except to the extent which the law prefers one class of legatees over the other.

However, the Appellants, desiring to bring this case within the purview of *Caton v. American Security and Trust Company*, *supra*, and *Wheeler v. Ruthven*, 74 N. Y. 428, which latter decision has been since discredited, have urged what they conceive to be peculiar circumstances which take this case out of the general rule. First of all they lay stress on the point that the decedent did not own a great deal of property aside from her interest in the trust estate created by her father. They then urge, in effect, that in view of the fact that Mrs. Butler survived the decedent, the decedent must have anticipated that fact and therefore did not want the legacies paid until the death of Mrs. Butler, and, therefore, did not want interest to be paid on the legacies.

It is the purpose of this brief to demonstrate that the Appellants' conclusion of fact upon which the first

point is made are incorrect and that the conclusions on the second point are likewise erroneous.

The Appellants in their brief stress the small amount of personal property aside from her interest in the trust fund which the decedent had on hand at the time of her death. The total value of such property was over \$9,000.00. Property aggregating \$5800.00 in value was specifically bequeathed. The debts at the time of her death amounted to \$3505.57. It is difficult to see how the decedent at the time she made her will could have foreseen the amount of her debts at the time of her death. However, all of this discussion on the part of the Appellants is beside the point. The decedent did have a *present* property of great value in the trust estate. The Appellants do not and cannot deny that the decedent at all times from the time the trust was created until the time of her death had a vested remainder in the entire trust estate. Conceding this, they cannot deny that at all times that vested remainder had a present value. In addition, the decedent was entitled to one-half of the income from the trust estate.

It is to be noted that the Appellants in their Statement of Facts on Page 5 of their brief lay stress upon the fact that when the executor of the decedent received on behalf of the estate one-half of the corpus from the trust fund, the Appellants were then minors. Having laid stress on this point it would be expected that the Appellants would deal with that agreement in their argument, contending perhaps that the agreement was not to their best interests as residuary legatees or that by virtue of the agreement the rights of the estate were changed from what they otherwise would have been. In other words, one would expect them to contend that the estate was not at that time entitled to one-half of

the corpus and such payment was a windfall which could not reasonably have been anticipated by the decedent. They have not, however, seen fit to make any argument on it. The reason therefor is plain. Although the decedent died before she attained the age of fifty, it is plain from the provisions of the trust that the corpus was to be paid to her eventually no matter what contingency arose. It is to be noticed that the direction of the trust is that there should be paid "unto my said daughter, Jenna May Butler, *or her heirs and assigns*, the entire corpus of my estate then in its hands." (Italics Supplied). It was well understood by William H. Butler in setting up the trust estate that his daughter, the decedent herein, might die before the termination of the trust. He plainly indicated that in that event the corpus was to go to the decedent's estate. If the decedent were to predecease her mother, as did actually happen, the trust to all intents and purposes terminated as to one-half thereof. The Appellants do not contend that Mary I. Butler was entitled to receive any income from more than one-half of the corpus nor do they contend that anyone other than the estate of the decedent herein was entitled to the one-half of the corpus which was distributed to the decedent's estate. The conclusion is inescapable that by the exercise of proper diligence the executor would have procured from the trust estate what in fact it did procure by agreement. In other words, at the time of the decedent's death there was available or would in the near future be available one-half of the corpus of the trust estate created by her father. This one-half of the trust estate together with income accumulated thereon totaled \$85,117.80, nearly enough, in itself, to pay the legacies in full.

The Executor even though it had obtained control of one-half of the trust estate did not see fit to liquidate it in full until 1927. No criticism is made of the Executor for doing so. Undoubtedly, it was to the best interests of the estate not to dispose of the real estate in the trust fund until the times when it was disposed of by the Executor. In making its payments to the legatees, the Executor applied them and the general legatees received them first as credits to interest and then to principal. The Appellants cannot explain away the effect of this delay on the part of the Executor. The Executor delayed for the benefit of the estate and the law is plain and unambiguous that when this is done and payment of general legacies is thereby delayed, interest must be paid on the legacies or on the unpaid balances.

Furthermore, although the remaining one-half of the corpus was not paid out of the trust estate into the estate of the decedent until after the death of Mary I. Butler, this remainder at all times had a cash value. The Executor could have disposed of it. The Appellants do not deny this. It is true that had the decedent disposed of this vested remainder during her lifetime or had the Executor done so a considerably smaller sum would have been realized than was realized by waiting for the life tenant to die. Had the vested remainder been disposed of then the Appellants would have received little or nothing but the general legatees would have then received all or practically all of their money. They have been deprived of the balance of their legacies for fourteen years although they could have received payment then. The Appellants, although they have gained by the delay are unwilling to have the general legatees compensated for the time they have been deprived of their legacies.

From the foregoing it can be readily seen that this case does not come within the purview of *Caton v. American Security and Trust Company, supra*. In the cited case the decedent expressly directed that assets from which certain legacies were to be paid should not be sold for a certain length of time. The will showed plainly the decedent anticipated a rise in the value of the assets from which the legacies were to be paid. It was apparent that the assets would not be sufficient to pay the legacies at their value at the time of the decedent's death and also apparent from the will itself that the decedent knew of this situation. In the will the decedent provided that certain preferred legatees should receive 5 per cent on their legacies. By his silence respecting the other legacies it was easily seen that he did not intend that they should receive interest. In the present case, however, the facts are entirely different. The will says nothing as to when assets shall be disposed of or when legacies shall be paid.

The Court would be going into forbidden territory were it to speculate, as the Appellants would have the Court speculate, as to how the decedent expected the legacies to be paid. The will says nothing on this subject. The will says nothing about interest. If inferences and presumptions are to be indulged in it must be presumed that the decedent knew the law. She knew that general legacies carry interest for one year after the death of the decedent *unless the will directs otherwise* either expressly or by unmistakable implication. She knew that the value of her or her estate's interest in the trust estate created by her father would be approximately enough to satisfy the general legacies even if she predeceased Mary I. Butler. With this knowledge in mind she left no directions. It must, therefore,

be presumed, if presumptions are to be indulged in at all, that she intended interest to be paid on the legacies.

The decision in *Wheeler v. Ruthven*, *supra*, as was demonstrated in the brief for the Appellee, the Baptist Home of Philadelphia, has been discredited by the decision of the same court In Re Rutherford, 196 N. Y. 311, which has been recently followed in New York on this precise question In Re White's Will 221 N. Y. S. 532.

The rule followed In Re Rutherford and In Re White's Will has been followed in other jurisdictions. In In Re Peck's Estate, 96 Vermont, 183, the decedent left a will containing a bequest of \$10,000.00 At the time of the making of the will and at the time of the decedent's death, the decedent was involved in litigation which was long protected regarding his interest in the estate of his deceased wife. In his will he made \$5,000.00 of the legacy contingent upon his making a satisfactory arrangement respecting his interest in his wife's estate. The decedent died in 1906. His estate did not receive its interest in his wife's estate until 1918. At the time of his death the decedent had approximately \$12,500.00 in assets other than his undetermined interest in his wife's estate. The Court there allowed allowed interest on the whole bequest of \$10,000.00.

Likewise in a Wisconsin case, In Re Forster's Will, 195 Wis. 58, the decedent left bequests which could not be satisfied out of the personal property. It was apparent from the will that he knew this to be the fact, because he directed that if necessary real estate should be sold to satisfy the legacies. He further provided, however, that the property should not be sold at a forced sale, and provided for a delay in selling the

property to satisfy the legacies. The property was located in various other states and, of necessity, could hardly be sold within a year. Despite these facts and despite the decedent's direction that the real estate should not be sold immediately, the court held that these facts were not a sufficient indication that interest should not be paid. Parenthetically, the Court in that case strongly limited the authority of *In Estate of Boyce*, 173 Wis. 575, which was one of the authorities relied on by this Court in *Caton v. American Security and Trust Company*, *supra*. The language used by the Wisconsin Court in *In Re Forster's Will*, *supra*, applies with great force here. There the Court said that it had gone as far as it could go in the *Boyce* case and that any further relaxation of the rule that interest shall be paid unless it is expressly or by very strong implication denied in the will itself, would lead to great confusion and uncertainty.

**Interest Was Correctly Computed by the Executor
and by the Court.**

The Appellees are not entitled to compound interest. No reason has been shown why the rule regularly in force that payments should be applied first to interest and then to principal has been suggested by the Appellants. They do not urge that the trust estate has been unproductive. Even if it remained static, the value of the remainder interest therein, which the decedent, and later her estate, had increased each year by mere lapse of time. However, all of these considerations are beside the point, because as was said in *Powell v. Drake*, *supra*, it is immaterial whether the decedent's estate has prospered or has suffered between the time of death and the time of payment of the general legacies.

CONCLUSION.

The Court below correctly decreed that interest was payable on the general legacies from one year after the decedent's death, and that there is now due interest from March 16, 1927, the last date to which interest was paid. The interest was correctly computed by the Executor and the Court below. The decree of the Court below should be affirmed.

Respectfully submitted,

PAUL B. CROMELIN,
FRANCIS C. BROOKE,
Of CROMELIN & LAWS,

*Attorneys for the Methodist Home of the
District of Columbia, Calvary Methodist
Episcopal Church and Rachel M. Bristol,
Appellees.*

J. BOND SMITH,
L. Q. C. LAMAR,

*Attorneys for Grace Middleton Herndon,
Isabel Middleton Morley, George Middle-
ton and Frederic A. Middleton,
Appellees.*

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED NOV 12 1937

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1937.

No. 6964.

SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, ET AL., *Appellants,*

v.

THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS, DECEASED,
ET AL., *Appellees.*

APPELLANT'S REPLY BRIEF.

LOUIS M. DENT,
J. RICHARD EARLE,
THOMAS S. JACKSON,
Attorneys for Appellants.

BRANDENBURG & BRANDENBURG,
Of Counsel.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.
APRIL TERM, 1937.

No. 6964.
SPECIAL CALENDAR.

MARY ELIZABETH WHITESIDE, ET AL., *Appellants*,
v.
THE WASHINGTON LOAN AND TRUST COMPANY, EXECUTOR
OF THE ESTATE OF MAY B. BEHRENS, DECEASED,
ET AL., *Appellees*.

APPELLANT'S REPLY BRIEF.

APPELLEE'S CASES NOT APPLICABLE.

Appellants do not dispute the general rule with regard to the payment of interest on legacies. It is our position that the rule is inapplicable here. Until the corpus of the Butler Estate might lawfully be distrib-

uted, there were no assets which might be used to pay the several legacies. The testatrix, in view of the circumstances existing at the time of her death, must have known this. Accordingly, the failure to pay, because there were not sufficient assets, created no right on the part of the several legatees to interest for non-payment. The force of our contention is not lessened by the authorities cited by the appellees, since the situation in each of the cases upon which they rely was essentially different from that presented here.

BRIEF FOR BAPTIST HOME FOR PHILADELPHIA.

This appellee relies upon *Powell v. Drake*, 19 App. D. C. 334. There, the delay in paying legacies was occasioned by litigation over the validity of the will. An examination of the case will show, however, that at all times the Executors had in their possession sufficient assets to pay all legacies. But for the litigation they could have paid immediately. The total legacies aggregated \$65,000. The Executors had in their possession over \$88,000 in securities and money.

Reid v. Dodge, 44 App. D. C. 558, merely determined that the testator's grandson, who was given the income from a trust fund created for his support and education, was entitled to interest from the date of the testator's death.

In *re Rutherford*, 196, N. Y. 311, applied the general rule with reference to interest on legacies because the testatrix had, apart from her contingent expectant interest in the estate of her husband, an estate of substantial amount. This estate was almost sufficient to pay all legacies in full. There was nothing in the case to indicate that the testatrix looked forward to a distribu-

tion from some other estate as the means by which legacies provided by her will would be paid.

This appellee argued that *In re Rutherford* overruled *Wheeler v. Ruthven*, upon which the appellants relied. As a matter of fact, there is nothing in the decision to support this claim. On the contrary, the court distinguished the *Rutherford* case by pointing out that there were no circumstances showing that the testatrix intended the legacies provided by her will should be paid when her contingent interest in the estate of her husband might vest in possession and enjoyment. In *Wheeler v. Ruthven*, however, as in the case at bar, the testatrix depended upon a distribution from another estate as the source from which her legacies would be paid.

In *re White's Will*, 221 N. Y. Supp. 532, likewise involves no departure from *Wheeler v. Ruthven*. On the contrary, that case is cited with approval in the opinion. The Surrogate merely decided that because there was a substantial estate which immediately passed to the Executors, interest should be paid in accordance with the general rule.

The doctrine of *Wheeler v. Ruthven* has been consistently applied in New York where the controversy involved similar facts. In *re De Freest's Will*, 200 N. Y. Supp. 445; In *re Gleason's Estate*, 277 N. Y. Supp. 452 (decided 1934); *Bank of Niagara v. Talbott*, 96 N. Y. Supp. 976 (Appellate Division).

Koon's Appeal, 113 Pa. 621, is based upon a statute providing that legacies, if no time be limited for the payment thereof, shall, in all cases, be deemed to be due and payable at the expiration of one year from the death of the testator. The court said this legislation supplies a testamentary intent. However, the rule for

which we contend was expressly recognized and approved in the opinion.

Dunham v. Dunham, 106 Mass. 586, involved the right to interest on legacies where there was a considerable estate, which, had it been sold, would have been sufficient to pay the legacies. The court held that an executor could not postpone a sale of these assets and thereby prevent payment. The right to interest where there was no estate with which to pay was not involved.

Bonham v. Bonham, 38 N. J. Equity 419, is likewise no authority against us. No facts are stated in the opinion, and it is simply a memorandum filed by the Chancellor. There had been a prior decree postponing the payment of legacies and the court merely said this did not affect their character. No authorities are cited in the opinion to support the conclusions reached.

BRIEF OF GRACE MIDDLETON HERNDON AND OTHERS.

In re *Peck's Estate*, 96 Vt. 183, the executor had in his possession a substantial estate out of which legacies could be paid. There was not, as in the case at bar, impossibility to pay except upon the distribution of some other estate.

In re *Forster's Will*, 195 Wis. 58, did not present the situation involved here. There was personal property aggregating \$70,000 besides a large amount of real estate. To the extent that the court allowed interest on legacies it is directly opposed to the decision of this Court in *Caton v. American Security and Trust Co.* The case shows, however, that the court approved its prior decision in *Estate of Boyce*, 173 Wis. 575, which was cited with approval by this Court in the *Caton case, supra*.

Both groups of appellees contend that they stood in the position of a creditor and were, therefore, entitled to interest within the general rule. This, however, begs the question. They never could be creditors in the true sense unless and until they had a present right to demand and enforce payment. Until that right accrued, they were not creditors. It could not be created by the agreement between the trustee of the Butler Estate and the life tenant under the Butler will. *Shelton v. King*, 229 U. S. 94. It only accrued when there were assets lawfully available for the payment of their legacies. Until Mrs. Butler died, they had no right to enforce payment, because there was no property belonging to the Behrens Estate out of which payment could be made. Mrs. Behrens knew this, and her will, read in the light of the circumstances surrounding its execution, should be construed accordingly.

As to the right of the Court to consider those circumstances in this case, we invite attention to *Black v. Hawkins*, 98 U. S. 324; *Lee v. Simpson*, 134 U. S. 572; *Cruit v. Owen*, 25 App. D. C. 514; *Caton v. American Security & Trust Co.*, *supra*; *American Security & Trust Co. v. Spencer*, 65 App. D. C. 200.

Respectfully submitted,

LOUIS M. DENIT,
J. RICHARD EARLE,
THOMAS S. JACKSON,
Attorneys for Appellants.

BRANDENBURG & BRANDENBURG,
Of Counsel.